









THE  
PRACTICE  
OF  
**The Court of King's Bench,**  
IN  
PERSONAL ACTIONS, AND EJECTMENT,

---

BY JOHN FREDERICK ARCHBOLD, ESQ  
BARRISTER AT LAW

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The Third Edition,  
TREATING INCIDENTALLY OF  
THE PRACTICE  
OF  
The Courts of Common Pleas and Exchequer,  
BY  
THOMAS CHITTY, Esq.  
OF THE INNER TEMPLE

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TO  
THE HONOURABLE  
SIR JOHN BAYLEY, KNIGHT,  
ONE OF THE BARONS  
OF  
HIS MAJESTY'S COURT OF EXCHEQUER,  
THIS WORK  
IS,  
WITH HIS PERMISSION,  
AND  
WITH SENTIMENTS  
OF THE GREATEST RESPECT AND ADMIRATION,  
DEDICATED,  
BY  
THE EDITOR.





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c. 46, § 3..18;—§ 4..22;—§ 5..18;—§ 6..17, 18;—§ 7..16;—§ 8..18;—§ 9..20;—§ 10..20;—§ 11..27, 930.
- 24 Geo. 2, c. 42, § 1..632.  
c. 44, § 1..691;—§§ 2, 4..693;—§ 7..694.
- 25 Geo. 2, c. 16..763.  
c. 36..780.  
c. 80, § 1..35.
- 27 Geo. 2, c. 17..12.
- 30 Geo. 2, c. 3, § 87..32.  
c. 19, § 75..16.
- 32 Geo. 2, c. 28, § 2..130;—§ 11..648;—§ 12..130;—§ 16..654, 655;—§ 17..655, 656.  
c. 32, § 20..607, 659.
- 38 Geo. 2, c. 53, §§ 1 & 10..217.  
1 Geo. 3, c. 23..5.
- 10 Geo. 3, c. 50..583;—§ 3..462;—§ 10..66.
- 13 Geo. 3, c. 63, § 44..254.
- 19 Geo. 3, c. 68, § 24..632.  
c. 70, § 4..719;—§ 5..341, 362;—§ 6..719, 722.
- 25 Geo. 3, c. 80, § 8..26;—§ 13..35;—§ 15..35;—§ 17..35;—§ 19..35;—§ 22..35;—§ 23..35;—§ 29..490.
- 26 Geo. 3, c. 44, § 2..654.
- 28 Geo. 3, c. 37, § 24..312.
- 31 Geo. 3, c. 32..22.
- 32 Geo. 3, c. 28, § 2..411.  
c. 33, § 22..74.  
c. 68, § 1..719,
- 33 Geo. 3, c. 5, § 3..654.  
c. 68, § 1..378.
- 34 Geo. 3, c. 14, § 2..18;—§ 3..21, 22;—§ 4..26;—§§ 10, 11..17.
- 36 Geo. 3, c. 104, § 38..754.
- 37 Geo. 3, c. 90, § 26..23;—§ 27..23;—§ 30..23, 24;—§ 31..24.  
c. 91, § 8..91.
- 38 Geo. 3, c. 50, § 9..67.  
c. 52, § 1..870;—§ 10..870.
- 39 Geo. 3, c. 110..5.

- 39 & 40 Geo. 3, c. 67..331;—art. 4..65.  
     c. 104, § 10..632.
- 41 Geo. 3, c. 90, § 9..229.  
     c. 106..67.
- 43 Geo. 3, c. 46..81, 122;—§ 2..126, 127, 150, 180, 386;—§ 3..  
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     c. 99, § 37..398.  
     c. 141..313, 694.  
     c. 155, § 28..68.
- 44 Geo. 3, c. 13, §§ 1 & 4..74.  
     c. 98..35;—§ 10..754.  
     c. 102..247.
- 46 Geo. 3, c. 37, § 1..278.
- 47 Geo. 3, c. 74..669.
- 48 Geo. 3, c. 123, § 1..656, 658.  
     c. 183..657.
- 49 Geo. 3, c. 28..17.  
     c. 121, § 14..40, 687.  
     c. 127..5.
- 51 Geo. 3, c. 124, § 1..78.
- 52 Geo. 3, c. 113, § 93..862.  
     c. 160..648.
- 53 Geo. 3, c. 17, § 27..114.  
     c. 21..648.  
     c. 113..648.
- 54 Geo. 3, c. 144..23;—§ 14..23.
- 55 Geo. 3, c. 184..17, 20, 22, 23, 575, 913.  
     Schedule, Part 2 and 3..35.
- 56 Geo. 3, c. 50..392.
- 57 Geo. 3, c. 52..558.  
     c. 93..576.
- 59 Geo. 3, c. 49, § 1..91.
- 1 Geo. 4, c. 21, § 1..61;—§ 2..61.  
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- 1 & 2 Geo. 4, c. 16..59.  
     c. 48..17;—§ 1..17;—§ 2..17, 18.
- 3 Geo. 4, c. 16..17.  
     c. 39..395, 396, 489, 498;—§ 1..497;—§ 2..395, 489,  
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     c. 102..59.
- 4 Geo. 4, c. 1..18.

5 Geo. 4, c. 41..35.

c. 106..861;—§§ 21, 22..870.

6 Geo. 4, c. 16..395, 487;—§ 9..618;—§ 10..3, 618;—§ 11..618;—§ 14..45;—§ 43..738;—§ 44..685, 686;—§ 59..660, 686, 689, 880;—§ 66..682;—§ 81..395, 489;—§ 82..181;—§ 89..682;—§ 90..684, 686;—§ 93..738;—§ 95..234;—§ 96..234;—§ 97..234;—§ 108..395, 486;—§ 117..116, 129, 707;—§ 118..117;—§ 120..688, 755;—§ 121..70;—§ 126..70, 409, 660, 880;—§ 127..606, 688.

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c. 109, § 73..754.

7 Geo. 4, c. 44, §§ 1, 4..18;—§ 5..17.

c. 57, § 15..650;—§ 33..396, 487, 489, 493, 497;—§ 34..397;—§§ 46, 55, 60..71;—§ 74..235.

7 & 8 Geo. 4, c. 3, § 6..623;—§ 7..623.

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c. 29, § 75..691, 693, 694.

c. 30, § 41..691, 693, 694.

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9 Geo. 4, c. 14..272.

c. 15..232, 256, 282, 283, 831, 846.

c. 25, § 1..17.

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c. 49..17;—§ 2..17, 18.

10 Geo. 4, c. 10..22.

11 Geo. 4, c. 9, § 7..18.

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3 Will. 4, c. 39, § 11..212.

3 & 4 Will. 4, c. 42..6, 261, 286 *c*, 286 *d*, 320, 544, 615, 861, 909,  
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## ADDENDA ET CORRIGENDA.

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- 392, l. 5 *from top*, add " By the 56 G. 3, c. 50, the sheriff is prohibited from selling, or carrying off from any lands, any straw, chaff or turnips, manure, &c., in any case whatever, or hay, tares, roots, or vegetables, &c. or other produce, contrary to the covenant, &c. with the owner or landlord, and of which covenant, &c. the sheriff has notice. By sect. 2, the tenant is bound to give notice of the existence of the covenants, and the sheriff is to give notice to the owner or landlord. By sect. 3, the sheriff may dispose of the produce, subject to an agreement to expend it on the land. By sect. 4, the sheriff is to assign the agreement to the landlord on being requested by him so to do. By sect. 5, the sheriff, before the sale, is to inquire as to the name and residence of the landlord. By sect. 6, the landlord is prohibited from distraining for rent on the purchaser's crops severed from the soil, or other things sold subject to the agreement. By sect. 7, the sheriff is not to sell any clover, &c. growing with corn. By sect. 8, the act is not to extend to any straw, &c. which the tenant may remove under a written contract. By sect. 9, the sheriff is not to be liable for damages, unless for a wilful omission, &c. The act does not affect the crown or an extent. 6 *Price*, 94."
279. *Interested witness, when may be examined, and course as to.* By the 3 & 4 Wm. 4, c. 42, s. 26, " in order to render the rejection of witnesses on the ground of interest less frequent," it is enacted, " That if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him." By sect. 27, " the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him shall at the trial be indorsed on the record or document on

which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and *shall be afterwards entered on the record of the judgment*; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

312. *Interest when to be given as damages.* By the 3 & 4 W. 4, c.42, s. 28, it is enacted, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." By sect. 29, "the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act."

791, in lines 22, 23, from top, *dele the words "If an appearance" &c. down to the words "Vol. 1, 454," inclusive.* Judgment of non pros cannot be signed by defendant in cases where the plaintiff has entered an appearance for him.

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[The following rules have been published by the Courts in this Hilary Term, 4 Wm. 4, but too late to embody them in the work itself. References, however, are made to that part of the work affected by them.]

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#### HILARY TERM, 4 WILL. IV.—1834.

IT IS ORDERED, That, from and after the first day of Easter Term next inclusive, the following Rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, and Courts of Error in the Exchequer Chamber:—

1. No demurrer, nor any pleading *subsequent* to the declaration, shall in any case be *filed* with any officer of the Court, but the same

shall always be *delivered* between the parties. (*See Vol. 1, 207, 208, 212; Vol. 2, 475*).

2. In the *margin* of every *demurrer*, before it is signed by counsel, *some matter of law intended to be argued shall be stated*: and if any *demurrer* shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular, by the Court or a Judge, and leave may be given to sign judgment as for want of a plea. (*See Vol. 2, 475, 200*).

Provided, That the party *demurring* may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way. (*See Vol. 2, 478*).

3. No rule for *joinder* in *demurrer* shall be required, but the party *demurring* may demand a *joinder* in *demurrer*, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment. (*See Vol. 2, 475*).

4. To a *joinder* in *demurrer* no signature of a *serjeant* or other counsel shall be necessary, nor any fee allowed in respect thereof. (*Such signature was never requisite in the King's Bench, though it was so in the Common Pleas and Exchequer, see Vol. 2, 475*).

5. The *issue* or *demurrer book* shall on all occasions be *made up* by the *suitor*, his *attorney* or *agent*, as the case may be, and not, as heretofore, by any officer of the Court. (*See Vol. 1, 214; Vol. 2, 476*).

6. No *motion* or rule for a *concilium* shall be required; but *demurrers*, as well as all *special cases* and *special verdicts*, shall be set down for argument at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of one shilling; and notice thereof shall be given forthwith by such party to the opposite party. (*See Vol. 1, 366, 370; Vol. 2, 478*).

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the *demurrer book*, *special case*, or *special verdict*, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two judges of the Court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies. (*See Vol. 1, 304, 306; Vol. 2, 478*).

8. Where a defendant shall plead a *plea of judgment recovered* in another Court, he shall, in the *margin* of such plea, state the *date* of such *judgment*, and, if such judgment shall be in a court of record, the *number* of the *roll* on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court, or a judge. (*See Vol. 1, 203, 204; Vol. 2, 482, 485*).

9. No *writ of error* shall be a *supersedeas of execution* until service of the *notice* of the *allowance* thereof, containing a statement of some particular ground of error intended to be argued. (*See Vol. 1, 336*).

Provided, that if the error stated in such notice shall appear to be frivolous, the court, or a judge upon summons, may order execution to issue.

10. No *rule to certify or transcribe the record* shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non-pros. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the clerk of the errors of the Court of error. (*See Vol. 1, 346*).

11. No *rule to allege diminution*, (*see Vol. 1, 347*), nor *rule to assign errors* (*see Vol. 1, 347*), nor *scire facias quare executionem non* (*see Vol. 1, 364*), shall be necessary, in order to compel an assignment of errors; but within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the court of error, or to the signer of the writs in the King's Bench, in cases of error to that Court, or within twenty days after the allowance of the writ of error, in cases of error *coram nobis*, or *coram vobis*, the plaintiff in error shall assign errors, and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non-pros.

12. The *assignment of errors and subsequent pleadings* thereon, shall be *delivered* to the attorney of the opposite party, and not *filed* with any officer of the Court. (*See Vol. 1, 348, 350*).

13. No *scire facias ad audiendum errores* (see Vol. 1, 365; Vol. 2, 609), shall be necessary (unless in case of a change of parties), but the plaintiff in error may demand a *joinder in error*, or plead to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a *joinder* or *plea*, or to *demur*, otherwise the judgment shall be reversed.

Provided, that if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a *joinder in error*, or *plea*, or *demurrer*, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time for the same purpose, after the 24th day of October, without reckoning any of the days before the 12th of August.

Provided also, that in all cases such time may be extended by a Judge's order.

Provided also, that in all cases of *writs of error to reverse fines and common recoveries*, a *scire facias* to the *terre-tenants* shall issue as heretofore.

14. When *issue in law* is joined, either party may *set down the case for argument* with the clerk of the errors of the Court of Error, or the clerk of the rules in the King's Bench (as the case may require), and *forthwith* give notice in writing thereof to the other party, and proceed to argument in like manner as on a *demurrer*, without any *rule* or *motion* for a *concilium*. (See Vol. 1, 366, 370, 352, 361. See the rule as to *demurrers*, *supra*, r. 6).

15. Four clear days before the day appointed for *argument*, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench (as the case may be), a sufficient sum to pay for such copies. (See Vol. 1, 352).

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument, but after judgment shall have been given in the Court of Errors in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the Court below, on a certificate of a clerk of the errors of the Exchequer Chamber of the judgment given, for

which a fee of 3s. 4d. and no more, shall be charged. (*See Vol. 1, 352*).

17. *Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1 Will. 4, s. 12. (See Vol. 1, 320 a; Vol. 2, 490, 500, 505).*

18. It shall not be necessary to *repass* any *Nisi Prius* record which shall have been once passed, and upon which the fees of passing shall have been paid; (*see Vol. 1, 266*); and if it shall be necessary to *amend* the day of the *teste* and *return* of the *distringas* or *habeas corpora*, or of the *clause* of *Nisi Prius*, the same may be done by the order of a Judge obtained on an application *ex parte*. (*See Vol. 1, 257, 259, 266*).

19. *Writs of trial* shall be sealed only, and not signed. (*See Vol. 1, 286 c*).

20. Either party, *after plea pleaded* and a reasonable time *before trial*, may give *notice* to the other, either in town or country, in the form hereto annexed, marked A, or to the like effect, *of his intention to adduce in evidence* certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required by summons, to shew cause before a Judge, why he should not consent to such admission; or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order, that the costs of *proving* any document, specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. (*See Vol. 1, 228, 232, 238*).

Provided that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents, intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of *proving* any written or printed document, shall be allowed to any party, who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and in the absence of a special order, the same shall be costs in the cause.

THO. DENMAN,  
N. C. TINDAL,  
LYNDHURST,  
J. BAYLEY,  
J. A. PARK,  
J. LITTLEDALE,  
S. GASELEE,  
J. VAUGHAN,

J. PARKE,  
W. BOLLAND,  
J. B. BOSANQUET,  
W. E. TAUNTON,  
E. H. ALDERSON,  
J. PATTESON,  
J. GURNEY.

# FORM OF NOTICE REFERRED TO.

A.

In the K. B. }  
C. P. } *A. B. v. C. D.*  
or Exchequer. }

Take notice, that the { Plaintiff } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { Defendant } his attorney, or agent, at , on , between the hours of ; and that the { Defendant } { Plaintiff } will be required to admit that such of the said documents as are specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

To E. F., Attorney  
or Agent for { Defendant }  
{ Plaintiff, }

G. H., Attorney  
for { Plaintiff }  
{ Defendant. }

[ Here describe the documents, the manner of doing which may be as follows:—



## ORIGINALS.

<i>Description of the Documents.</i>	<i>Date.</i>
Deed of Covenant between A. B. and C. D., 1st part; and E. F. 2nd part - - -	1st January, 1828
Indenture of Lease from A. B. to C. D. -	1st February, 1828
Indenture of Release between A. B., C. D. 1st part, &c. - - - - -	2nd February, 1828
Letter, Defendant to Plaintiff - - -	1st March, 1828
Policy of Insurance on Goods by ship Isa- bella on Voyage from Oporto to London }	3rd December, 1827
Memorandum of Agreement between C. D., Captain of said Ship, and E. F. - - }	1st January, 1828
Bill of Exchange for £100 at Three Months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H. }	1st May, 1829

## COPIES.

<i>Description of Documents.</i>	<i>Date.</i>	<i>Original, or Duplicate, served, sent, or delivered, when, how, and by whom.</i>
Register of Baptism of A. B. in the Parish of X. - - - - }	1st January, 1808.	
Letter — Plaintiff to Defendant - - - }	1st February, 1828.	Sent by General Post, 2nd February, 1828.
Notice to produce Papers	1st March, 1828.	Served 2nd March, 1828, on Defen- dant's Attorney, by E. F. of ———
Record of a Judgment of the Court of King's Bench, in an action, J. S. v. J. N. - - }	Trinity Term, 10th Geo. IV.	
Letters Patent of King Charles II. in the Rolls Chapel - - }	1st January, 1680.	

[*The following rules, also, in addition to the preceding ones, have been promulgated by the Judges, but are not to have effect until six weeks after the same have been laid before both Houses of Parliament. They chiefly relate to pleadings, and the mode of entering and transcribing pleadings, judgments, and other proceedings, and to the payment of costs*]

HILARY TERM, 4 WILL. 4.

WHEREAS it is provided by the statute 3 & 4 Will. 4, c. 42, s. 1, that the Judges of the Superior Courts of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said Courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said Act should take effect, make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which rules, orders and regulations were to be laid before both Houses of Parliament as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both Houses of Parliament, but after that time should be binding and obligatory on the said Courts, and all other Courts of Common Law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament;—

Provided that no such rule or order should have the effect of depriving any person of the power of pleading the *general issue*, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do, by virtue of any Act of Parliament then or thereafter to be in force;—

It is therefore ordered, that from and after the first day of *Easter Term* next inclusive, (unless Parliament shall in the mean time otherwise enact), the following Rules and Regulations, made pursuant to the said statute, shall be in force.

*First General Rules and Regulations.*

1. Every pleading, as well as the declaration, shall be intitled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration, and other pleading, shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date; unless otherwise specially ordered by the Court or a Judge.

2. No entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any

record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.

Provided that such regulation shall not alter or affect any existing rules of practice as to the *times of proceeding* in the cause.

Provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in Banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose *after the last pleading*, or the *issuing of the jury process*, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an *affidavit*, that the *matter thereof* arose within eight days next before the pleading of such pleas, or unless the Court or a judge shall otherwise order.

3. All *judgments*, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided that it shall be competent for the Court or a judge to order a judgment to be entered *nunc pro tunc*.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said Act of the 3d & 4th Wm. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged;—

*Several counts shall not be allowed*, unless a *distinct subject-matter of complaint* is intended to be established in respect of each, nor shall *several pleas*, or *avowries*, or *cognizances*, be allowed, unless a *distinct ground of answer or defence* is intended to be established in respect of each.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description or circumstances only, are not to be allowed.

*Ex. gr.* Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So, counts for not giving or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro ratâ itineris* upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed.

In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts, founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, *et gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

*Pleas, avowries and cognizances*, founded on one and the same principal matter, but varied in statement, description or circumstances only, (and pleas in bar in replevin are within the rule), are not to be allowed.

*Ex. gr.* Pleas of *solvit ad diem* and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of *A. B.*, in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.*, for the like purpose, are also distinct, and to be allowed.

But pleas of an agreement to accept the security of a third person, in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct, for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage *feasant*, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The *examples* in this and other places specified, are given as *some instances only* of the application of the rules to which they relate; but the *principles* contained in the rules *are not to be considered as restricted* by the examples specified.

6. Where *more than one* count, plea, avowry or cognizance shall have been used, *in apparent violation of the preceding rule*, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries or cognizances introduced in violation of the rule be struck out at the *cost* of the party pleading; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some *distinct subject-matter of complaint* is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries or cognizances, in which case he shall *endorse upon the summons*, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries or cognizances mentioned in such application, which shall be allowed.

7. Upon the *trial*, where there is more than one count, plea, avowry or cognizance upon the record, and the party pleading *fails to establish a distinct subject-matter of complaint* in respect of each count, or some distinct ground of answer or defence in respect of

each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an *application* to a Judge has been made under the preceding rule, and any count, plea, avowry or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bond fide* intended to be established at the trial, in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry or cognizance so allowed, if the Court or Judge before whom the trial is had, shall be of opinion that *no such distinct subject-matter of complaint was bond fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry or cognizance so allowed, and shall so *certify* before final judgment, such party so pleading shall not recover *any costs upon the issue or issues upon which he succeeds*, arising out of any count, plea, avowry or cognizance with respect to which the Judge shall so certify.

8. The *name of a county* shall in all cases be stated in the *margin* of a declaration, and shall be taken to be the *venue* intended by the plaintiff, and no *venue* shall be stated in the body of the declaration, or in any subsequent pleading.

Provided, that in cases where *local description* is now required, such local description shall be given.

9. In a *plea or subsequent pleading*, intended to be pleaded in bar of the *whole action generally*, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any *prayer of judgment*, nor shall it be necessary in any *replication or subsequent pleading* intended to be pleaded in maintenance of the whole action, to use any allegation of "*precludi non*," or to the like effect, or any *prayer of judgment*; and all pleas, replications and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively *in bar of the whole action, or in maintenance of the whole action*, provided that nothing herein contained shall extend to cases where an *estoppel* is pleaded.

10. No *formal defence* shall be required in a *plea*, and it shall commence as follows, "The said defendant by his  
attorney [or, "in person," &c.] says, that

11. It shall not be necessary to state, in a second or other plea or avowry, that it is pleaded by *leave of the Court or according to the form of the statute*, or to that effect.

12. No *protestation* shall hereafter be made in any pleading; but

either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

13. All *special traverses*, or *traverses* with an inducement of affirmative matter, shall *conclude to the country*.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.

14. The *form* of a *demurrer* shall be as follows, "The said defendant, by his attorney [*or*, "in person," &c. *or*, "plaintiff"] says, that the declaration [*or*, plea, &c.] is not sufficient in law;" showing the special causes of demurrer, if any.

The *form* of a *joinder in demurrer* shall be as follows, "The said plaintiff [*or*, defendant] says, that the declaration [*or*, "plea," &c.] is sufficient in law."

15. The *entry of proceedings* on the *record for trial*, or on the *judgment roll* [*according to the nature of the case*,] shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any *prior entry* made or supposed to be made on any roll or record whatever.

16. No fees shall be charged in respect of more than *one issue* by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit or in any action of debt on simple contract, or in any action on the case.

17. When money is paid into Court, such payment shall be pleaded in all cases and as near as may be in the following form, *mutatis mutandis*:

C. D. } The day of

ats. } The defendant by

A. B. } his attorney [*or*, "in person," &c.] says, that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £ ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages [*or*, in actions of debt, "that he is not indebted to the plaintiff,"] to a greater amount than the said sum, &c. in respect of the cause of action in the declaration mentioned, and this he is ready to verify; wherefore, he prays judgment if the plaintiff ought further to maintain his action."

18. No rule or Judge's order to pay money into Court shall be necessary, (except under the 3d and 4th Will. 4, c. 42, s. 21), but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of *payment of money into Court*, shall be at liberty to *reply* to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and in case of nonpayment thereof within 48 hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply, "that he has sustained damages [or, "that the defendant is indebted to him," as the case may be,] to a greater amount than the said sum;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

20. In all cases under the 3d & 4th Will. 4, c. 42, s. 10, in which, after a plea in *abatement* of the *nonjoinder* of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:

"(Venue)—A. B., by E. F. his attorney, [or, in his own proper person, &c.] complains of C. D. and G. H., who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H. &c." (The same form to be used *mutatis mutandis* in cases of arrest or detainer).

21. In all actions by and against *assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties*, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

## PLEADINGS IN PARTICULAR ACTIONS.

### I. *Assumpsit*.

In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a *denial in fact* of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.



In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon *bills of exchange* and *promissory notes*, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *ex. gr.* the drawing or making, or indorsing, or accepting or presenting, or notice of dishonour of the bill or note.

3. In every species of *assumpsit*, all matters in *confession* and *avoidance*, including not only those *by way of discharge*, but those which show the transaction to be either *void* or *voidable* in point of law, on the ground of fraud or otherwise, shall be *specially pleaded*; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

4. In actions on *policies of assurance* the interest of the assured may be averred thus:—"That A., B., C. & D., or some or one of them, were or was interested, &c." And it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

## II.—In Covenant and Debt.

1. In *debt* on *specialty* or *covenant*, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of "*nil debet*" shall not be allowed in any action.

3. In actions of *debt* on *simple contract*, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non*

*assumpsit*, in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on *bills of exchange* and *promissory notes*, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

### III.—*Detinue*.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

### IV.—*In Case*.

1. In actions *on the case*, the plea of *not guilty* shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

*Ex. gr.* In an action on the case for a *nuisance* to the occupation of a house by carrying on an offensive trade, the plea of *not guilty* will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action on the case, for *obstructing a right of way*, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

In an action of *slander* of the plaintiff in his office, profession, or trade, the plea of *not guilty* will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an *escape*, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In this form of action *against a carrier* the plea of *not guilty* will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in *confession* and *avoidance* shall be pleaded specially, as in actions of *assumpsit*.

V.—*In Trespass.*

1. In actions of trespass *quare clausum fregit*, the *close* or *place* in which, &c. must be *designated* in the declaration by name or abutments, or other description, in failure whereof the defendant may demur specially.

2. In actions of trespass *quare clausum fregit*, the plea of *not guilty* shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. In actions of trespass *de bonis asportatis*, the plea of *not guilty* shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a *right of way* with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a *right of common of pasture* for divers kinds of cattle, *et. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

PROVIDED nevertheless, that nothing contained in the 5th, 6th or 7th of the above-mentioned General Rules and Regulations, or in any of the above-mentioned Rules or Regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date *before the first day of Easter Term next*.

**ISSUES, JUDGMENTS and other PROCEEDINGS in Actions commenced by Process under 2 Will. 4, c. 39, shall be in the several Forms in the Schedule hereunto annexed, or to the like effect, *mutatis mutandis*: Provided, that, in case of non-compliance, the Court or a Judge may give leave to amend.**

No. 1.

*Form of an Issue in the King's Bench, Common Pleas or Exchequer.*

In the King's Bench ; or,  
In the Common Pleas ; or,  
In the Exchequer.

The [date of declaration] day of                      in the  
year of our Lord 18

[Venue].—A. B. by E. F., his attorney, [or, in his own proper person, or, by E. F., who is admitted by the Court here to prosecute for the said A. B., who is an infant within the age of 21 years, as the next friend of the said A. B., as the case may be], complains of C. D., who has been summoned to answer the said A. B. [or, arrested or detained in custody] by virtue [or served with a copy, as the case may be] of a writ issued on [date of first writ] the day of                      in the year of our Lord 18                      out of the Court of our Lord the King, before the King himself at Westminster, [or, out of the Court of our Lord the King, before his Justices at Westminster, or, out of the Court of our Lord the King before the Barons of his Exchequer at Westminster, as the case may be,] For that

[Copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.]

Thereupon the Sheriff is commanded that he cause to come here, on the                      day of                      twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.,

No. 2.

*Form of Nisi Prius Record in the King's Bench, Common Pleas or Exchequer.*

[The placita are to be omitted.—Copy the issue to the end of the award of the venire, and proceed as follows:]

Afterwards on the [teste of distringas or habeas corpora] day of                      in the year                      the Jury between the parties aforesaid is respited here until the [return day of distringas or habeas corpora] day of                      unless                      shall first come on the [first day of sittings or commision day of assizes] day of                      at                      according to the form of the statute in such case made and provided for default of the

Jurors, because none of them did appear ; therefore let the Sheriff have the bodies of the said Jurors accordingly.

[*The postea is to be in the usual form.*]

### No. 3.

*Form of Judgment for the Plaintiff in Assumpsit.*

[*Copy the issue to the end of the award of the venire, and proceed as follows :*]

Afterwards the Jury between the parties is respited until the [return of distringas or habeas corpora] day of unless shall first come on the [day of sittings or Nisi Prius] day of at according to the form of the statute in that case made and provided for default of the Jurors, because none of them did appear.

Afterwards on the [day of signing final judgment] day of came the parties aforesaid, by their respective attorneys aforesaid, [or, as the case may be], and before whom the said issue was tried, hath sent hither his record, had before him in these words :

[*Copy postea.*]

Therefore it is considered that the said *A. B.* do recover, against the said *C. D.*, his said damages, costs and charges by the Jurors aforesaid, in form aforesaid, assessed ; and also, £ for his costs and charges by the Court here adjudged of increase to the said *A. B.* with his assent, which said damages, costs and charges in the whole amount to £ , and the said *C. D.* in mercy, &c.

### No. 4.

*Form of the Issue when it is directed to be tried by the Sheriff.*

[*After the joinder of issue proceed as follows :*]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon on the [teste of writ of trial] day of in the year pursuant to the statute in that case made and provided, the Sheriff [or, the Judge of being a Court of Record for the recovery of debt in the said county, as the case may be,] is commanded that he summon twelve, &c., who neither &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly ; and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lord the King to him in that behalf directed, with the finding of the Jury thereon indorsed, on the day of &c.



## No. 7.

*Form of Indorsement thereon, in case a Nonsuit takes place.*

*[After the words "duly sworn to try the issue within mentioned" proceed as follows:]*

And were ready to give their verdict in that behalf, but the said A. B. being solemnly called, came not, nor did he further prosecute his said suit against the said C. D.

## No. 8.

*Form of Judgment for the Plaintiff after Trial by the Sheriff.*

*[Copy the issue, and then proceed as follows:]*

Afterwards, on the [day of signing judgment] day of \_\_\_\_\_ in the year \_\_\_\_\_ came the parties aforesaid, by their respective attorneys aforesaid,\* [or, as the case may be], and the said Sheriff. [or, Judge, as the case may be], before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words; to wit,

*[Copy the Indorsement.]*

Therefore it is considered, &c. [in the same form as before.]

# INTRODUCTION

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- CHAP. 1. *The Jurisdiction of the Court of King's Bench.*  
2. *The Judges and Officers of the Court.*  
3. *Terms and Returns, &c. Routine of Business of the Court, &c.*
- 

## CHAPTER I.

### THE JURISDICTION OF THE COURT OF KING'S BENCH.

*In what actions.*] THE Court of King's Bench has jurisdiction in all *personal* actions (with the exception of penal actions in some particular instances) and in *ejectment*. It has no jurisdiction in a mere *real* action, nor in the greater part of *mixed* actions (a).

It would be more for the amusement than profit of the reader, to inquire into the source of such jurisdiction; suffice it to observe, that upon the division of the *Aula Regia*, the Court of King's Bench retained an original jurisdiction and cognizance of all *trespasses*, and of other injuries alleged to be committed *vi et armis* (b). So that at all times, since the first establishment of this Court, actions of trespass might be commenced here. In *ejectment*, also, (which in its nature is an action of trespass, and was originally but a personal action) (c), this Court has always claimed and exercised original jurisdiction. In *pound breach* and *rescous*, this Court has always exercised original jurisdiction; for although these actions, strictly speaking, are not actions of trespass, yet as the declarations allege the injuries to be committed *vi et armis*, as they are in fact forcible injuries and against the peace, and as the defendant, if convicted, was formerly obliged to pay a fine to the King as well as damages to the party injured, they have always been considered as within the cognizance of this Court. In *replevin* also this Court has always exercised jurisdiction, either upon an original *replegiari facias* returnable here (d), or when the plaint in the

(a) 3 Bla. Com. 42, 43; Bac. Ab. Courts (A).

(b) Finch, L. 198; 3 Bla. Com. 42; Steph. Pl. 4, 5.

(c) Fitz. Abr. Eject. Firm. pl. 2.

(d) As to which, see *post*, Vol. 2, Book 3, Part 1, Chap. 2, s. 2.



county court has been removed here by the writ of *pone, recordari facias loquelam*, or *accedas ad curiam*. This Court also claims, and has always exercised, original jurisdiction, in actions of *conspiracy, deceit, maintenance, forgery* of deeds, and all other actions founded upon falsity or fraud; for all these partake of a criminal nature, and formerly rendered the defendant liable to pay a fine to the King if convicted (e). When actions *on the case* came into general use, in consequence of the statute of Westminster 2nd, c. 24, this Court immediately claimed cognizance of them, and insisted that the original writ then in existence might, in such cases, be made returnable in this Court, as well as in the Court of Common Pleas; for although in these actions the injuries are not alleged in the declaration to be committed *vi et armis*, yet the actions are actions of *trespass* on the case, and render the defendant liable to a fine, if convicted. Whether this claim were well-founded, is now a matter of very little importance; it is sufficient to know that the Court claimed, and has ever since exercised, jurisdiction in all these actions of trespass on the case. In all other personal actions, not above specified, such as *debt, covenant, account, &c.* this Court has also original jurisdiction. When or how it acquired it, is perhaps unknown; but that it claims, and uniformly exercises it, is indisputable. In a case, decided in this Court in the time of Lord Mansfield, an action of debt having been commenced here by original, the defendant on this account pleaded to the jurisdiction. The Court, however, upon demurrer to the plea, gave judgment for the plaintiff; and declared that if such a plea should again come before it, it would inquire by whom it was signed (f).

As regards *penal actions*, by stat. 21 J. 1, c. 4, all suits for offences against any penal statute for which a common informer may ground any *popular action, bill, plaint, suit, or information* before justices of assize, of *nisi prius*, of gaol delivery, of oyer and terminer, or justices of the peace, shall be prosecuted before such justices, and not in the Courts at Westminster. This statute extends, in the first place, only to such penal statutes as were in force when this statute, 21 J. 1, c. 4, was enacted (g); and secondly, to such penal statutes only as enable the inferior court to proceed by action, bill, plaint, or information. Therefore, where an action was brought in this Court on stat. 1 J. 1, c. 22, which gives power to an inferior court to *inquire* of the offence, and to *hear and determine* the same, the Court held that an action for the penalties might be brought in this Court; for the inferior court had power to proceed by indictment or presentment only (h). And in all other cases, not within this statute, where an offence is created by statute under a penalty, an action for the penalty may be brought in this Court, unless the Court be ousted of its jurisdiction by express words in the statute creating the offence, or by necessary implication (i).

(e) Finch, L. 193.

(f) Tidd, 9th ed. 102.

(g) *Shipman v. Henbest*, 4 T. R. 109.(h) *Id.*; and see *Jeffery v. Cules*, Willes,634; *Curlewis v. Dudley*, 2 L. Raym. 872; 1 Saund. 312 a.(i) *Cates v. Knight*, 3 T. R. 444.

*By what process such actions commenced.]* Formerly the process for commencing any of the above actions in which this Court had jurisdiction, might have been by an *original writ* which issued out of Chancery, and was obtained of the cursor. Formerly also, although the original design and establishment of this Court was to determine criminal matters, frauds and breaches of the peace; yet if any one had a cause of action against an attorney or officer of the Court, or against any person in the *actual* custody of the Marshal for a matter within its jurisdiction, he could not have sued him elsewhere, but must have proceeded in this Court by exhibiting a *bill* against him (*k*). A fiction, grounded upon a part of this practice, gave the Court nearly an unlimited jurisdiction in all personal actions by *bill*. Upon a defendant's being brought before the Court, by bill of Middlesex, latitat, &c. for a supposed trespass, (that is, in bailable cases as soon as he had put in and perfected bail, or, in nonbailable cases as soon as he had entered an appearance or an appearance was entered for him by the plaintiff according to the statute), he was then considered as in the custody of the Marshal; and the plaintiff was at liberty to waive the trespass, and exhibit a *bill* against him for any other cause of action he might think proper (*l*); for the Judges of this Court maintained, that when a party was once brought into Court, and either in the actual or supposed custody of the Marshal, he could not be charged, even for any civil matter, elsewhere (*m*), and that, being then before the Court, the plaintiff might have proceeded against him for any other cause of action, besides the trespass for which he was in actual or supposed custody. By the aid of this fiction, the Court long exercised a jurisdiction by *bill* in personal actions (whether the defendant were in the actual, or merely in the supposed custody of the Marshal) in all cases, excepting where the defendant was a peer, or member of the House of Commons, not in the actual custody of the Marshal (*n*), and except in actions against corporations, or against the inhabitants of a county or hundred, or other like district generally, who could not even be supposed to be in such custody. Formerly also, this Court had jurisdiction, by *attachment of privilege*, in all personal actions, in which the attorneys or officers of the Court were plaintiffs (*o*). It also formerly had jurisdiction, by *original writ* and *writ of habeas corpus*, in all personal actions against knights, barons, and others being members of Parliament (12 & 13 K. 3, c. 3).

Now, however, by the statute 2 W. 4, c. 39, the process for commencing such actions, in this or any of the superior Courts at Westminster, is 1st. a *writ of summons*, in cases where it is not intended to hold the defendant in custody, or to proceed against him by *attachment of privilege*, according to the Bankrupt Act, (6 G. 4, c. 16, 10), and a *writ of distringas*, to enforce the defendant's appearance.

(*k*) Bro. Bille, pl. 6, 31; 2 Sams. 11.  
n. 1; Steph. Pl. 68.

(*l*) *Foster v. Bann*, 1 Cowp. 45; R. E. 15 G. 2, r. 1.

(*m*) *Jackon v. Mackreth*, 5 T. R. 34.  
Steph. Pl. 68.

to such writ of summons, in case he cannot be served with it; or, 2ndly, a writ of *capias*, in cases where it is intended to hold the defendant to bail, such defendant not being in the custody of the Marshal of the Marshalsea, or Warden of the Fleet; or, 3rdly, a writ of *detainer*, in cases where it is intended to detain a person in custody of the Marshal or Warden; or, 4thly, another kind of writ of *summons*, in cases where it is intended to proceed against a member of Parliament, according to the provisions of the Bankrupt Act. These writs, and the proceedings on them, will be fully noticed hereafter in their proper places.

In the action of *ejectment*, the old mode of commencing it by serving a declaration founded on a supposed original writ issued, (which is most usual), or on a supposed bill filed, still prevails. In *replevin* also, and suits removed from inferior courts, the old mode of commencing and proceeding in them, noticed *ante*, 1, 2, still prevails.

*As a Court of Appeal.*] The judgments of all Courts in England, inferior to the Court of Common Pleas, (excepting the courts of London, of the Cinque Ports, and of a few other places), if erroneous, must be brought under the review of this Court, for revision and correction: the judgments of inferior courts of record, where the proceedings are according to the course of the common law, by writ of error; the judgments of inferior courts of record, where the proceedings are summary, or different from the course established by the common law, by writ of *certiorari*; and the judgments of inferior courts not of record, by writ of false judgment. (1 W. 4, c. 70, s. 13). Formerly also, the judgment of the Court of Common Pleas, if erroneous, must have been revised and corrected in this Court, by writ of error: but the statute of 1 W. 4, c. 70, s. 8, provides, that writs of error upon any judgment given by either of the three Courts at Westminster, shall be returnable only before the judges, and judges and barons, as the case may be, of the other two Courts, in the Exchequer Chamber, and thence into the House of Lords only. (See Book I. Part I. c. 4, s. 3, of this Volume, title "*Writ of Error*").

## CHAPTER II.

## THE JUDGES AND OFFICERS OF THE COURT.

SECT. 1. *The Judges, 5, 6.*2. *The immediate Officers of the Court, their Holidays, &c. 6 to 14.*3. *Cursitors, 14.*4. *Sheriffs, 14.*5. *Attornies, 16 to 55.*

## SLCT. 1.

*The Judges.*

THE Court of King's Bench consists of a Chief Justice and four Puisne Judges, who are by their office the sovereign conservators of the peace, and supreme coroners of the kingdom. The chief justice is appointed by writ; the other judges by patent. By stat. 12 & 13 W. 3, c. 2, it is enacted that the commissions of the judges shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries (a) ascertained and established; but that it may be lawful to remove them on the address of both houses of Parliament. And by stat. 1 G. 3, c. 23, (enacted at the earnest recommendation of the king himself from the throne), the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries absolutely secured to them during the continuance of their commissions; his Majesty being pleased to declare that "he looked upon the independence and uprightness of the Judges as essential to the impartial administration of justice; as one of the best securities, of the rights and liberties of his subjects; and as most conducive to the honour of the crown" (b).

In the *Articuli super cartas*, 28 Ed. 1, c. 5, it is provided that the justices of the Court shall follow the king, "so that he may have always near unto him some that be learned in the laws." For some centuries past, however, they have usually sat at Westminster, an ancient palace of the crown, but they would of course be obliged to

(a) As to the salaries of the Judges, see the 6 G. 4, cc. 83, 84; 7 W. 4, c. 79.

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(b) *Chanc. Journ* 3rd March, 1761, 1 Bla. Com. 267, 268.

follow the king into any part of the kingdom, if he should think proper to command them to do so; and there is even an instance, in the reign of Edward the First, of this Court having sat at Roxburgh in Scotland (c).

The Judges have privilege of suing and being sued in their own Court (d). But if the Chief Justice of this Court, for instance, bring an action here, the *placita* must be before the other three Judges, omitting the chief (e); otherwise it would be error (f). It should seem they could not be arrested on mesne process.

The course of the proceedings of the Judges in court and at chambers will be considered hereafter, when noticing the routine of the business of the Court, *post*, Chap. 3. It may be here observed, however, that any Judge of either of the three superior courts may attend, and transact such business at *chambers*, or *elsewhere*, depending in any of such courts, as relates to matters over which such courts have a common jurisdiction (g), and as may, according to the course and practice of the Court, be transacted by a single Judge. (1 W. 4, c. 70, s. 4).

By the 1 W. 4, c. 70, s. 11, in all cases relating to the practice of any of the three superior Courts at Westminster, in matters over which they have a common jurisdiction, or of or relating to the practice of the Court of Error in the Exchequer Chamber, the Judges of such courts jointly, or any eight or more of them, including the chiefs of each court, may make general rules and orders for regulating the proceedings of all such courts; which rules and orders are to be observed therein; and no general rules and orders respecting such matters shall be made in any manner, except as aforesaid. Also by the 2 W. 4, c. 39, s. 14, (the Uniformity of Process Act) the Judges of such courts may, and they are required to make general rules and orders for the effectual execution of that act, and for fixing the costs in respect of the matters therein contained. And by the 3 & 4 W. 4, c. 42, various powers are given to the Judges, *viz.* to alter the present mode of pleading, &c. (s. 1); to make regulations as to the admission of matter, documents, &c. in evidence, &c. (s. 15); to make regulations as to the officers for taxing costs, (s. 36); and, as to paying money into court in certain actions (s. 21).

(c) M. 20, 21 Ed. 1; Hal. Hist. C. 200.

(d) 3 Leon. 149.

(e) *Reg. v. Rogers*, 2 Ld. Raym. 778.

(f) 8 H. 6, 81. *Wood v. Mayor of London*, 1 Salk. 398.

(g) The words "common jurisdiction" must be understood with reference to the subject matter of the application, and not with reference to the Court itself. *Phillips v. Drake*, Exch. 6 Leg. Obs. 157, 2 Dowl. P. C. 45.

## SECT. 2.

*The immediate Officers of the Court, their Holidays, &c. (h).*

The officers immediately concerned in transacting the business of this Court shall form the subject of the present section; cursitors, sheriffs, and attornies shall be noticed hereafter.

These officers enjoy the same privilege from arrest that attornies do, (*see post*, 68), and even such of them as do not personally attend to the duties of their offices, but perform them by deputy, are, it seems, equally entitled to this privilege (*i*). Where an attorney, indebted to one of the clerks in court for fees in a certain cause, died, the Court, upon application, ordered them to be paid by the client out of money then remaining due by the client to the attorney's executor (*j*). And if a client, when his business in court is despatched, refuse to pay the officer the fees that are due to him for doing his business, the Court on motion will grant an attachment against him, to have him committed until he pay the fees; for, not paying the fees is a contempt of Court, and the Court is bound to protect its officers in their rights (*k*). An officer of the Court has also a lien on the papers in his hands, until his fees are paid him (*l*).

As regards the *holidays* to be allowed in the several offices of these officers, the recent stat. 3 & 4 W. 4, c. 42, s. 43, after reciting that "the observance of holidays in the said Courts of common law during *term* time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice;" enacts, "that none of the several days mentioned in the 5 & 6 Ed. 6, c. 3 (*m*), shall be observed

(h) As to the fees of these officers, see Tidd's Supplement, 32 to 53.

(i) 2 Sel. Pr. 21.

(j) *Waldron's case*, 2 Str. 1126; *Re v. Smollet*, 3 Bur. 1313, S. P.

(k) 1 Lil. Pr. Reg. 598.

(l) *Fayewell v. Coker*, 2 P. Wms. 460; *Anon.* 2 Ves. 25.

(m) That act enacted, that "all the days hereafter mentioned shall be kept and commanded to be kept holidays, and none other, that is to say—all *Sundays* in the year, the days of the *Feast* of the *Circumcision* of our Lord (being the 1st of *January*), of the *Epiphany* (6th of *January*), of the *Purification* of the Blessed Virgin *Mary* (2nd of *February*), (*see Harrison v. Smith*, 9 B. & C. 243), of *St. Matthias* the Apostle (24th of *February*), of the *Annunciation* of the Blessed Virgin (25th of *March*), of *St. Mark* the Evangelist (25th of *April*), of *St. Philip* and *St. James* the Apostles (1st of *May*), (*see 2 Smith Rep.* 403), of the *Ascension* (*see Sparrow v. Cooper*, 2 W. Bla. 1314) of our

Lord (which is a moveable feast—happening forty days after *Easter*, and ten days before *Whituntide*), of the *Nativity* of *St. John* the Baptist (24th of *June*), (*see Sparrow v. Cooper*, 2 W. Bla. 1314), of *St. Peter* the Apostle (29th of *June*), (*Treddale v. Fennell*, Tidd, 9th ed. 57), of *St. James* the Apostle (25th of *July*), of *St. Bartholomew* the Apostle (24th of *August*), of *St. Matthew* the Apostle (21st of *September*), of *St. Michael* the Archangel (29th of *September*), of *St. Luke* the Evangelist (18th of *October*), of *St. Simon* and *St. Jude* the Apostles (28th of *October*), of *All Saints* (1st of *November*), of *St. Andrew* the Apostle (30th of *November*), of *St. Thomas* the Apostle (21st of *December*), of the *Nativity* of our Lord (25th of *December*), and the three following days (being the feast days of *St. Stephen* the Martyr, *St. John* the Evangelist, and the *Holy Innocents*), and *Monday* and *Tuesday* in *Easter* and *Whitun* weeks.

or kept in the said Courts, or in the several offices belonging thereto, except *Sundays*, the day of the nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week." Besides these days enumerated in this statute, it seems that the following days are usually half holidays, though in term time—viz. the Martyrdom of Charles I. (January 30th), the Restoration of King Charles II. (29th of May) (*n*), the Birth-day and Landing of William III. (4th of November); the Anniversary of the Gunpowder Plot (5th of November), and the Lord Mayor's Day (9th of November). There are also other *State* holidays; as the birth-day, accession, proclamation and coronation of the reigning monarch, and the birth-days of his consort and the Prince of Wales—which are generally kept as half holidays.

In *vacation*, besides these days already enumerated as holidays in term time, when they happen to fall in vacation, Good Friday, Ash Wednesday, the Birth-day of the Princess Victoria (24th of May) (*o*), and the Anniversary of the Fire of London (2nd of September), are generally kept as *whole* holidays. Shrove Tuesday is only a half holiday. Before the 3 & 4 W. 4, c. 42, s. 43, the Conversion of St. Paul (the 25th of January), and St. Barnabas Day (11th of June), were kept as holidays, but since that act they may perhaps be considered as abolished, although not named in the 5 & 6 Ed. 6.

On these holidays, the officers are in the habit of attending at their offices, but are not bound to do so, and they require a gratuity for any business done by them (*p*). As regards their right to this gratuity, in a case upon this subject, Lord Ellenborough said, "if the day in question be a legal holiday, make it a holiday; but it shall not be made a source of profit." The practice, however, of taking it still continues, and it seems the right cannot now be contested; and in a case where an officer refused to do business on a holiday unless an extra fee were paid to him, and the business was consequently not done, the Court refused to interfere, in a summary manner, to punish the officer, or cause him to make satisfaction for a loss sustained by his refusal to do the business required (*q*).

If an officer of the Court be guilty of extortion, or taking an improper fee, he is subject to an indictment (*r*) or an action (*s*), or an application to the Court (*t*).

(*n*) *Pater v. Croome*, 7 T. R. 336. Where the sealer of the writs exacted an extraordinary fee for sealing a writ on the 29th May, alleging that it was a holiday, the Court, upon application, ordered him to refund it. *Worthy v. Pater*, 5 Taunt. 180; and see *Harrison v. Smith*, 9 B. & C. 243; *Sparrow v. Cooper*, 2 W. Bl. 1314; *Figgins v. Willie*, 1d. 1186; Tidd, 9th ed. 35; 1 Chlt. Rep. 400, n. (*o*), S. P.; *Seal Office*, 2 Smith's Rep. 403.

(*o*) There does not appear, however, to be any express authority for this.

(*p*) Bail may be put in on a holiday, if not a Sunday; *Baddeley v. Adams*, 5

T. R. 170; but judgment cannot it seems be signed on. *Harrison v. Smith*, 9 B. & C. 243; and vide *Bennett v. Potter*, 2 C. & J. 622.

(*q*) *Martin v. Bold*, 7 Taunt. 182, 2 Marsh. 487, S. C.; and see *Tweeddale v. Fennell*, Tidd, 9th ed. 57.

(*r*) Co. Lit. 36b, n. (*b*); *Empson v. Bathurst*, Hut. 53; *Hescott's case*, 1 Salk. 330.

(*s*) *Figgins v. Willie*, 2 Bla. Rep. 1187; *Woodgate v. Knatchbull*, 2 T. R. 148.

(*t*) *Longdill v. Jones*, 1 Stark. 345; *Sparrow v. Cooper*, 2 Bla. Rep. 1314; *Pater v. Croome*, 7 T. R. 336; and see Tidd's Supp. 52, 53.

The following is a list of the officers of the Court and of *Nisi Prius*, arranged alphabetically.

*Associate.*] Appointed by the Chief Justice.

*Calendar Keeper.*] Appointed by the Clerk of the Crown.

*Chaplain of the King's Bench Prison.*] Appointed by the Mars ha He must reside within the prison or its rules (a).

*Clerk of the Common Bails, Postras, and Estreats.*] Appointed for life by the Prothonotary. Office, in the King's Bench Office. Attendance from 11 to 2, and from 5 to 7, in term, and for one week after Michaelmas and Easter terms, and ten days after Hilary and Trinity terms; at other times in vacation, from 11 to 3.

*Clerks in Court.*] Appointed by the Clerk of the Crown. Crown Office, King's Bench Walk, Temple. Attendance from 10 to 2, and from 6 to 9, every day in term; and for a week before term, and a few days after it, from 10 to 2, and from 6 to 8.

*Clerk of the Crown.*] Usually called Master of the Crown Office; and in pleadings and other law proceedings styled, "Coroner and Attorney of our lord the King:" he holds his office for life, by letters patent under the great seal. Crown Office, King's Bench Walk, Temple. Attendance in the office from 10 to 2, and from 6 to 9, every day in term; and for a week before term, and a few days after it, from 10 to 2, and from 6 to 8.

*Clerk of the Day Rules in the King's Bench Prison.*] Appointed by the Marshal. Office, King's Bench Prison. He must reside within the prison or its rules (b).

*Clerk of the Declarations.*] Appointed for life by the Prothonotary. Office, in the King's Bench Office. Attendance from 11 to 2, and from 5 to 7, in term, and for a week after Easter and Michaelmas terms, and ten days after Hilary and Trinity terms; at other times in vacation, from 11 to 3.

*Clerk of the Dockets, Commitments, and Satisfactions.*] Appointed by the Prothonotary, and holds his place for life. Office, in the King's Bench Office. Attendance from 11 to 2, and from 5 to 7, in term, and during one week after Michaelmas and Easter terms, and for ten days after Hilary and Trinity terms; at other times in vacation, from 11 to 3.

*Clerk of the Errors.*] Appointed by the Chief Justice. Office, over

(a) *Re Bryant*, 4 T. R. 716; 5 Id. 511, S. C.

(b) *Id.*



the Chief Justice's chambers, Serjeants' Inn. Attendance from 11 to 2, and from 6 to 8, during term and the sittings; at other times, in vacation, from 11 to 1.

If the clerk of the errors do not receive writs of error, nor do those things which appertain thereto, the clerk of the treasury shall do the duty of the clerk of the errors in that behalf. (*R. T. 20 C. 1*).

*Clerk of the Grand Juries.*] Appointed by the Clerk of the Crown.

*Clerk of the Judgments.*] See *Clerk of the Dockets, &c. supra*.

*Clerks of Nisi Prius.*] Appointed by the *Custos Brevium* for the different counties.

*Clerk of Nisi Prius for London and Middlesex.*] Appointed by the Chief Justice.

*Clerk of the Outlawries.*] See *Filacer, post*, p. 12.

*Clerk of the Papers.*] Appointed for life by the Chief Clerk. Office, Symond's Inn, Chancery Lane. Attendance, during term, from 10 to 2, and from 5 to 9; during eight days after Michaelmas and Easter terms, from 10 to 2, and from 5 to 8; after Hilary and Trinity terms, to the last day of giving notice of trial before the last commission-day, from 10 to 2, and from 5 to 8; during the remainder of the vacation, to the essolgn day of the next term, from 10 to 2; and from the essoign-day to the first day of the term, from 10 to 2, and from 5 to 8. This office is shut on the last commission-day on the circuit, at the Summer Assizes, and is opened again on the 15th October; but it will be opened in the mean time, to any person, upon application.

*Clerk of the Papers of the King's Bench Prison.*] Appointed by the Marshal. Office, King's Bench Prison. He cannot act by deputy; and, like the other officers of the prison, must be resident within the prison or its rules (*c*).

*Clerk of the Rules.*] Appointed for life by the Prothonotary. Office, Symond's Inn, Chancery Lane. Attendance, in term, from 10 to 2, and from 6 to 9; and during a week before, and a few days after, term, from 10 to 2, and from 6 to 8; at all other times in vacation from 10 to 2.

*Clerk of the Rules on the Crown Side.*] Appointed by the Clerk of the Crown. Crown Office.

*Clerk of the Treasury.*] The Clerk of the Treasury, or, as he

is usually called, the *Custos Brevium*, appoints the Clerk of the Inner and Upper Treasury, and the Clerk of the Outer Treasury. These officers attend at the Treasury Chamber, every day in term, during the sitting of the Court; and in the evening from 6 to 8, at their office under the King's Bench Office, Temple. In vacation they attend at their office in the Temple from 11 to 3. The keys of the Treasury may be had in vacation, and searches made, &c.

*Commissioners for taking Affidavits.*] Appointed in every place of any importance throughout England, by commission from the Chief Justice and one or more of the Puisne Judges, for the taking of affidavits in all matters or causes depending, or to be depending, in this Court, by virtue of stat. 29 C. 2, c. 5. They are in nearly all cases attorneys of the Court; they may be attorneys of the Counties Palatine, (*R. E.* 4 G. 4); but not persons practising as conveyancers, unless they be also certificated attorneys. (*R. H.* 3 & 4 G. 4). See post, Vol. 2, Chap. 39, as to affidavits in general.

*Commissioners for the Examination of Witnesses.*] Appointed by the Court upon application of any of the parties to the suit for the examination of witnesses, in pursuance of the 1 W. 4, c. 22, s. 4. See post, Chap. 2, Sect. 6.

*Commissioners for taking Bail.*] Persons "other than common attorneys or solicitors," appointed in every place of any importance throughout England, by commission from the Chief Justice and one or more of the Puisne Judges, for the taking of recognizances of bail, in any action depending in this Court, by virtue of stat. 4 W. & M. c. 4, s. 1.

*Crier and Usher.*] The chief Crier and Usher holds his office by letters patent under the great seal, for two lives, and executes it by three deputies. The office of deputy, however, is, it seems, distinct and separate from that of chief crier and usher, and not dependent on him; and the deputy holds his office for life, notwithstanding the death or secession of the principal. The fees to the principal and deputy are also distinct (*d*).

*Crier at Nisi Prius in London and Middlesex.*] Appointed by the Chief Justice.

*Custodes Brevium.*] Appointed by the Chief Justice, and hold their office for two lives. See *Clerks of the Treasury*. Office under the King's Bench Office.

The *Custos Brevium* shall indorse upon every writ, on what day, and at what hour the same was filed. (*R. H.* 2 W. 4, reg. 12; *R. T.* 30 G. 3; 3 T. R. 787.)

*Deputy Marshal of the King's Bench Prison.*] Appointed by the Marshal. He must reside within the prison or its rules (e).

*Examiner.*] Appointed by the Clerk of the Crown.

*Exigenter.*] See *Filacer, infra.*

*Filacer, Exigenter, and Clerk of the Outlawries.*] Appointed by the Chief Justice (f). Office, No. 1, Pump Court, Temple. Attendance from 11 to 2, and from 5 to 7, in term, and for a week after Easter and Michaelmas terms, and ten days after Hilary and Trinity terms; in vacation, from 11 to 3.

By rule *E. T. 31 Car. 2*, all writs and process, issuing upon original writs, before the appearance of the defendant, must be signed by the filacer. But original writs and process thereon are no longer issuable in personal actions, excepting for the purpose of removing replevin or other suits from inferior courts, and the subsequent proceedings therein, and excepting also in ejectment. (2 *W. 4, c. 39*). In these excepted actions, the filacer has the signing of writs and process, as heretofore; he also has the signing of writs of exigent, of proclamation, and *capias utlagatum* in proceedings to outlawry.

*Marshal and Associate to the Chief Justice.*] Appointed by the Chief Justice. Office, Clifford's Inn. Attendance, in term, from 11 to 2, and from 6 to 8. There are no fixed hours in vacation, but attendance is usually given from 11 to 2.

*Marshal of the King's Bench Prison.*] He holds his office under a patent from the crown. However, by stat. 27 *G. 2, c. 17*, the Marshal shall hold his office so long, as he shall behave himself well in it, and be resident within the prison or the rules thereof, and no longer; and the same of the inferior officers of the prison (g). And by sect 8 of the statute, the Court of King's Bench may remove either the Marshal, or any of the inferior officers of the prison, for non-residence, or other neglect of duty, or for any such misbehaviour, &c., as the said Court shall deem sufficient cause for such removal. By *R. M. 2 G. 4*, the Marshal must reside in the prison, or its rules, according to the 5th section of the above act, and of his patent. (See *R. M. 3 G. 2, respecting the duties of the Marshal, and the government of the King's Bench Prison; and also as to the fees to be paid to him and to the other officers of the prison. See also 4 Bur. 2183. 2185*).

*Master of the Crown Office.*] See *Clerk of the Crown, ante*, p. 9.

(e) *Re Bryant*, 4 T. R. 716; 5 Id. 9th ed. 49.  
511, S. C.

(f) See the 6 *G. 4, c. 83, s. 15, Tidd*, 509, S. C. (g) *Re Bryant*, 4 T. R. 716; 5 Id.

**Master of the King's Bench Office, or Secondary.]** Appointed by the Prothonotary. The Master's Assistant is also appointed by the Prothonotary. Office, Paper Buildings, Temple. Attendance from 11 to 2 for a week before term; from 11 to 2 and from 6 to 8 in term; and from 11 to 2 after term, until the end of the sittings in London; and during the assizes after the issuable terms. At all other times from 11 to 1. He is not compellable to attend at any time between the last day of August and the 21st of October, for the purpose of taxing costs on a judgment signed under the 1 W. 4, c. 7, allowing judgment on causes tried in vacation, &c., to be signed and execution issued in vacation. (1 W. 4, c. 7, s. 6).

This officer is more properly called the *Secondary*, and is a deputy of the Prothonotary or Chief Clerk. The business in this Court was formerly transacted by clerks in court, as agents for the attornies, in the same manner as it used to be in the Exchequer. The Secondary was the superior of these clerks, and from this circumstance obtained the denomination of Master.

Upon every appointment to be made by the Master, the party on whom the same shall be served shall attend such appointment without waiting for a second; or, in default thereof, the Master shall proceed *ex parte* on the first appointment. (R. H. 32 G. 3; 4 T. R. 580).

**Prothonotaries.]** Appointed by the Chief Justice, and hold their office for two lives (h).

**Sealer of the Writs.]** The office of Sealer of the Writs, both in this Court and in the Common Pleas, is holden in fee by patent, and is at present vested in the Duke of Grafton, who executes the duties of it by deputy (i). Office, 3, Inner Temple Lane. Attendance from 11 to 2, and from 5 to 7, during term, and for ten days after every issuable term, and one week after every other term; and from 11 to 3 at all other times. (R. T. 54 G. 3).

No printed blanks, or other writs whatsoever, shall be sealed, before the same are regularly made out and filled up (j).

**Signer of the Bills of Middlesex.]** Appointed by the Puisne Judges. Bill of Middlesex Office, Clifford's Inn. Attendance from 11 to 2, and from 5 to 7 in term, and for one week after Easter and Michaelmas terms, and for ten days after Hilary and Trinity terms; in vacation, from 11 to 3.

All writs of summons, *distringas*, *capias*, and detainer, although issued out of this Court into Middlesex, are no longer to be issued, signed, and sealed by this officer, but by the officer who issues writs of summons, &c. into other counties, namely, the Signer of the Writs. (3 & 4 W. 4, c. 67, s. 1) (k).

**Signer of the Writs.]** Appointed by the Prothonotary. Office,

(h) See Tidd, 9th ed. 46, 47.

(i) By the 6 G. 4, c. 89, the Commissioners of the Treasury are authorized to purchase this office.

(j) R. 3 April, 1747; and see the 6 G.

4, c. 21, s. 53; 1 Chit. Rep. 320, (u); Tidd, 9th ed. 54.

(k) See the former rule of M. T. 3 W. 4.

**King's Bench Walk.** Attendance from 11 to 2, and from 5 to 7 in term, and during one week after Easter and Michaelmas terms, and for ten days after Hilary and Trinity terms; in vacation from 11 to 3.

All writs of summons, *distringas*, *capias*, and detainer, issued out of this Court, into any county, are to be issued and signed by this officer. (3 & 4 W. 4, c. 67, s. 1; R. M. 3 W. 4).

*Secondary.*] See *Master of the King's Bench Office*.

*Secondary, on the Crown Side.*] Appointed by the Clerk of the Crown. Crown office.

*Tipstaves.*] Appointed by the Marshal of the King's Bench prison.

*Trainbearer.*] Appointed by the Chief Justice.

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#### SECT. 3.

#### *Cursitors.*

The Cursitors are of very ancient institution: they are in number twenty-four, and were incorporated by Queen Elizabeth. They make out all original writs; and the business of the several counties in England, in this respect, is distributed among them by the Lord Chancellor, by whom they are also appointed. They are called Cursitors, from the writs *de cursu*; in stat. 18 Edw. 3, s. 5, they are called Clerks of Course. Office, Roll's Yard, Chancery Lane. Attendance from 11 to 2, and from 6 to 8, in term, and from 11 to 3 in vacation.

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#### SECT. 4.

#### *Sheriffs.*

It is not intended to treat, in this place, of the duties of the office of sheriff, but merely to give an abstract of the few rules of this Court relating to that officer and his deputies. As to the duties of the office, the reader will find that subject, at least such parts of it as relate to the execution and return of writs, arranged under proper heads, in the course of the work (*m*).

Every sheriff shall appoint a sufficient deputy under the penalties mentioned in stat. 23 H. 6, c. 10; (R. E. 15 C. 2); and every such sheriff or his deputy shall give his personal attendance in Westminster Hall, every day during term. (*Id.*) And by 3 & 4 W. 4, c. 42, s. 20, it is enacted, "that from and after the 1st of June, 1833, the sheriff of each county in England and Wales shall severally name a

(*m*) See the Index at end of Vol. 2, title Sheriff.

*sufficient deputy*, who shall be resident or have an office within one mile from the *Inner Temple Hall*, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff."

No sheriff shall issue blank warrants, upon pain of severe punishment and fine; (*R. E. 15 Car. 2*); nor shall he issue a warrant to any of his officers, to arrest or attach any person, until a writ shall have first been delivered to him. (*R. M. 1654, s. 2*).

Formerly, sheriffs, before or immediately after the end of every term, were, by *R. E. 6 J. 1*, bound to deliver into court all writs of *latitat*, and all writs thereupon issuing, and were obliged to make oath that the writs so returned by them were all that were directed and delivered to them. Now, however, writs of *latitat*, and writs thereupon, are abolished by 2 *W. 4, c. 39*, and, in lieu of them, writs of summons and *distringas* in non-bailable actions, and writs of *capias* in bailable actions, are issuable. By the same act and the forms given thereby, it will be found, that the sheriff or other officer to whom a writ of *capias* is directed, must, *immediately* after the execution of it, return the same to the Court, together with the manner in which he has executed the same, and the day of such execution; or, if the same remains *unexecuted*, he must return it *at the expiration of four months* from its date, or *sooner* if ordered by the Court or a Judge; and if ordered by the Court in term, or a Judge in vacation, to make such return, and he omit returning it, he may be attached for a contempt, the Judge's order (if any) being first made a rule of Court, and a copy of the rule served. He may also, after the return day of any writ of *capias ad satisfaciendum, fieri facias, or elegit*, be ruled by the Court or ordered by a Judge in vacation to return the same, and may be attached in a similar way for disobeying such order(n). The sheriff, however, cannot be thus compelled to return the writ between the 10th August and 24th October (o).

When the rule or order to return a writ expires in vacation, the sheriff must file the writ at the expiration of the rule or order, or as soon after as the office opens, (*R. E. 2 W. 4, r. 11*); and the officer with whom it is filed must indorse the day and hour of such filing. (*Id. r. 12*).

In the case of a *habeas corpus*, returnable *immediate*, the sheriff shall make his return the same day the writ is delivered to him, and shall bring the body immediately, as is required by the writ, without permitting him to wander abroad by colour or pretence thereof. (*R. M. 1654, s. 7; post, Vol. 2, Book 4, Chap. 3*).

If any sheriff, under-sheriff, bailiff of a liberty or his deputy, or other sheriff's bailiff, &c., shall wilfully delay the execution or return of any process or execution, or shall take or require any undue fees for the same, or shall give notice to the defendant, thereby to frustrate the execution of any process or writ, or, having levied money, shall detain it in his hands after the return of the writ, he shall be liable to an

(n) See 2 *W. 4, c. 39*, and *R. M. 3 W. 4, reg. 13*, and the mode of compelling the return and procuring the attach-

ment, *post*, 131, &c.

(o) *MS. M. T. 1833*.

attachment, &c. (*R. M.* 1654, s. 2). So, if he take immoderate or excessive fees for executing a writ of possession or of restitution of possession, this Court will proceed to punish him according to law (o).

If any bailiff or sheriff's officer shall take a warrant of attorney from any person in his custody, unless in the presence of an attorney for the defendant, he shall be severely punished. (*R. E.* 15 C. 2).

No under-sheriff, or sheriff's bailiff, or bailiff of a liberty, shall practise as an attorney; (*R. M.* 1654, s. 1); also, no sheriff's officer, or other person concerned in the execution of process, shall be permitted to be bail in any action in this Court. (*R. M.* 14 G. 2).

## SECT. 5.

### Attornies.

1. *Articled Clerks*, 16 to 23.
2. *Attornies, their Privileges, &c.*, 23 to 32.
3. ———, *Appointment of, to sue and defend, &c.*, 32 to 38.
4. ———, *Duties and Undertakings, &c. of, and how punished for Misconduct or Negligence, &c.*, 38 to 44.
5. ———, *Delivery of Bill, Taxation of, and Remedy for Costs*, 44 to 55.

#### 1. *Articled Clerks.*

No attorney shall have more than two articled clerks at the same time; (2 G. 2, c. 23, s. 15); nor shall an attorney take or retain an articled clerk after he has left off practice, or during such time as he shall not actually practise or carry on the business of an attorney. (22 G. 2, c. 46, s. 7).

Also, no attorney, employed as a writer or clerk by another attorney, shall, during the time he is so employed, take or have any clerk under articles; and no service to such attorney, during the time he is so employed, shall be deemed good service (p).

*The Articles (q).*] In order that a person, before he can be admitted an attorney, shall acquire competent skill and knowledge to conduct the business of an attorney, it is enacted, that no person shall practise as an attorney in any Court of record, unless he have been bound, by contract in writing, to serve as a clerk, for the space of five years from the date prospectively, to an attorney duly and legally sworn and admitted, (2 G. 2, c. 23, s. 5, made perpetual by 30 G. 2, c. 19, s. 75; and see *R. M.* 1654, ss. 1, 4); or for the space of three years to such attorney, if he (the clerk) have taken the degree of bachelor of arts or of law in the Universities of Oxford, Cambridge,

(o) *R. M.* 1654, s. 2. As to the remedy against a sheriff or bailiff for extortion, see Tidd's Supplement, 53.

(p) *R. T.* 31 G. 3, r. 2; 4 T. R. 379;

see *Frazer's case*, 1 Burr. 291, and *post*, p. 18.

(q) See a form, *Chit. Forms*, 1.

or Dublin, provided he have taken such degree within four years previously, and provided such degree of bachelor of arts has been taken within six years, or such degree of bachelor of law has been taken within eight years after matriculation, (1 & 2 G. 4, c. 48, s. 1, amended by 3 G. 4, c. 16); under a penalty of 50*l.*, (2 G. 2, c. 23, ss. 12—24). These provisoes, however, as to having taken a degree, do not apply to persons who have taken such degree previous to the passing of the 1 & 2 G. 4, c. 48. (7 G. 4, c. 44, s. 5). Where a gentleman who had taken the degree of bachelor of arts at Cambridge articulated himself to an attorney for *three* years, but, having served only *two months*, abandoned the contract, and, after the expiration of the *three* years mentioned in the original articles, he was assigned to another attorney with whom he served *two years and ten months*, the Court of Common Pleas held, that as the original articles had expired previously to the assignment, the service under it was not a service within the meaning of the 1 & 2 G. 4, c. 48, s. 1 (r).

The attorney must not, as we have just seen *supra*, have left off or ceased to practise, nor must the clerk serve as a writer or clerk to another attorney. But if the clerk serve five years to the prothonotary or secondary of this Court, (2 G. 2, c. 23, s. 16); or to the master of the crown office, (49 G. 3, c. 28); it will be sufficient to entitle him to his admission. The clerk may also serve *one* of the five years with a barrister or certificated special pleader. (1 & 2 G. 4, c. 48, s. 2, *post*, p. 18).

By the 9 G. 4, c. 49, persons who have served their articles of clerkship in any of the courts of Great Sessions in Wales (now abolished) or of the counties palatine, may, upon payment of 120*l.* stamp duty, be admitted an attorney or solicitor in any of the Courts at Westminster. And by the 1 IV. 4, c. 70, ss. 16, 17, 'persons who had been attornies of the now abolished courts of Chester or Wales are allowed to practise and be admitted in any of such courts, upon payment of one shilling (s), &c.

By the 9 G. 4, c. 25, s. 1, the solicitor or attorney of the treasury, customs, excise, stamps, or other branches of the revenue, may act and practise as such (t).

The articles must be *stamped* before they are engrossed. (34 G. 3, c. 14, ss. 10, 11). Occasional indemnity acts, however, allow the stamp to be afterwards impressed. (See 9 G. 4, c. 49, s. 2). Stamp 120*l.*; and for any counterpart or duplicate, 1*l.* 15*s.* (55 G. 3, c. 184).

Where an attorney took a turnkey of the King's Bench prison as an articulated clerk, evidently for the purpose of securing the business of the prisoners, the Court ordered the articles to be cancelled (u).

*Affidavit of execution.*] Within *three months* after the date of the articles, an affidavit must be made of their execution, and filed with the secondary or his clerk; which affidavit must specify the names

(r) *Ex p. Unthank*, 2 M. & P. 453, and see *Ex p. Rowle*, 2 Chit. Rep. 61, post 20.

(s) See *Ex p. Roud*, 1 B. & Adol. 95

(t) See *West v. Taunton*, 6 Bingh. 40

(u) *Fruzer's case*, 1 Bur. 201.



of the attorney and clerk, and their places of abode, together with the day of the date of the articles (x).

The officer with whom this affidavit is filed, shall enter in his book a memorandum of the substance of such affidavit and of the day on which it was made and filed; for which he may take a fee of 2s. 6d. (22 G. 2, c. 46, s. 6). At the same time he shall make a memorandum on the back or bottom of the affidavit, of the day of filing the same, (*Id.* s. 3).

As clerks frequently omit by mistake to make and file this affidavit, an indemnity act is occasionally passed, to remedy the omission (y). A clause of this nature in the indemnity act of 4 G. 4, c. 1, has been held to be *prospective* as well as *retrospective*; and extended to those who were in default during the time for which it was made, and was not limited to those who had incurred penalties or disabilities before it passed (z).

*Enrolment of Articles.*] Within six months after execution, the articles must be enrolled or registered with the officer appointed for that purpose, together with an affidavit of the execution; and if not enrolled or registered within that time, the service under the articles shall be deemed to commence from the date of such enrolment. (34 G. 3, c. 14, s. 2). The officer of the King's Bench with whom they are to be enrolled is the Master of the King's Bench Office. Where the articles were lost, the Court allowed a copy of them to be enrolled (a); but they have no power to remedy an omission to enrol the articles, &c., within the time here limited, for it is expressly enacted by the statute, that the service, in such a case, shall commence from the date of the enrolment only (b). Indemnity acts, however, are occasionally passed, to remedy the omission. (See 1 W. 4, c. 26, s. 6).

*Service.*] The clerk shall continue and be actually employed by the attorney or solicitor to whom he is bound, or by his agent, in the proper business, practice, or employment of an attorney or solicitor, during the entire period of service, (*viz.* for five years) (c), specified in the articles, (22 G. 2, c. 46, s. 8; 2 G. 2, c. 23, s. 5); and of the time so specified he shall not serve more than one year with the agent. (R. T. 31 G. 3; 4 T. R. 379). Or if he be bound for five years, and serve a part of the time (not exceeding a year) as pupil to a practising barrister, or certificated special pleader, such part shall be reckoned and allowed him in the five years. (1 & 2 G. 4, c. 48, s. 2). These provisions must be strictly complied with: there must be an actual and continued service under the master's control, during the

(x) 22 G. 2, c. 46, ss. 3, 5; see form of the affidavit, Chit. Forms, 3.

(y) See 7 G. 4, c. 44, ss. 1, 4; 7 & 8 G. 4, c. 45; 9 G. 4, c. 47, s. 3; c. 49, s. 2; 11 G. 4, c. 9, s. 7; 1 Will. 4, c. 26, s. 6.

(z) *Re Stevenson & others*, 2 B. & C. 34.

(a) *Ex p. Clarke*, 3 B. & Ald. 610.

(b) *Ex p. Pilgrim*, 2 D. & R. 429; 1 B. & C. 264, S. C.

(c) *Ex p. Tench*, Chit. Coll. Stat. 67, n. 9.

entire period of five years, specified in the articles. Serving a part of the time with another attorney, even with his master's consent, and the remainder of the time with his master, is not deemed sufficient (*d*); but it is not inconsistent with these regulations, for the clerk, in his leisure hours, after he has done his master's business, to do business for another attorney (*e*); and perhaps, under very special circumstances, the Court would not be so very strict in their construction of the statute in this respect, if there has been a *bond fide* service (*f*). And where the clerk, with the consent of his master, had served portions of his time to an agent, and within two months of the expiration of the five years, he was absent from his duties, with the consent of his master and the agent with whom he was engaged, but after the period of the five years he served out the two months, he was admitted an attorney (*g*). If the service has been prevented by the act of God, and the applicant has done all in his power to serve, it will be sufficient. And therefore an articled clerk, who had served under the articles two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the Court to be admitted an attorney (*h*). But where an articled clerk held the office of surveyor of taxes during the time for which he was bound, although it appeared that this occupied but an eighth part of his time, and that the remainder was devoted to the study of his profession, yet the Court held that this could not be deemed a service of his whole time, so as to entitle him to be admitted; and having been admitted, they ordered him to be struck off the roll (*i*). The clerk, however, in this case, afterwards bound himself to another attorney, and served him *two* years, at the expiration of which period he was again admitted an attorney, upon an affidavit, that, for more than *three* of the *five* years for which he was originally bound, his service had been given to the attorney to whom he was articled; and on a motion to strike him off the rolls, it was held that his service under the first articles could not be coupled with his service under the second, so as to entitle him to be admitted (*k*).

But if the attorney die before the expiration of the period of service, or discontinue his practice, or if the contract be cancelled by mutual consent, or the clerk be discharged by rule of Court, if the clerk be afterwards (no matter at what distance of time) (*l*), bound by contract in writing to serve, and shall actually serve, *another attorney*, for the residue of the five years, such service shall be deemed good and effectual, as if the clerk had continued to serve the person to whom he was originally articled; provided an affidavit of the execution of such second articles be made and filed within three

(*d*) *Ex p. Hill*, 7 T. R. 456.

(*e*) *Ex p. Hunt*, 3 W. Bl. 764.

(*f*) See *Fletcher's case*, 2 W. Bl. 734.

(*g*) *Ex p. Hubbard*, 1 Dowl. P.C. 438. and MSS.

(*h*) *Ex p. Matthews*, 1 B. & Adol. 160.

(*i*) *Re Taylor*, 5 B. & A. 538; 6 D. & R. 428, S. C.; and see *Rex v. Scrivener's Company*, 10 B. & Cress. 511.

(*k*) *Re Taylor*, 6 D. & R. 428; 4 B. & Cress. 341, S. C.

(*l*) *Re Smith*, 1 D. & R. 14.

months after the date of the same, in the manner already specified (*m*). These second articles must have a stamp of 1*l*. 15*s*. (55 *G.* 3, c. 184). They should stipulate that the clerk should serve such a new term as will make up, with the prior service, the full and actual service of five years.

Where a clerk had served part of his time with a master who had left the country, and, before his articles were assigned to another master, an interval of ten months had elapsed, *during which he was not serving under any articles*, but under the assignment he served the remainder of the time specified, the Court would not allow him to be admitted, until he had served out the ten months under the new articles (*n*).

The Court have granted a rule to discharge an articled clerk where the attorney to whom he was bound had become *bankrupt* and absconded (*o*); and the Court directed the rule to be served at the last place of abode of the attorney, on the clerk to the commission of bankruptcy, and also to be stuck up in the King's Bench Office.

Where the business of an attorney had so much decreased, that there remained little or nothing for the clerk to do, and consequently he could not gain the necessary instruction in his profession; the Court, upon application, and an affidavit of these circumstances, referred it to the master, to ascertain what portion of the premium originally received with the clerk should be refunded (*p*). So, upon the death of the attorney before the expiration of the period of service, or if under any other circumstances (*q*) the clerk, or his parents, would in justice be entitled to a return of a part of the premium given with him, the Court, it should seem, would interfere in the same summary manner; and where a party was articled as a clerk to one of two attorneys in partnership, and paid a *premium*, and acted as clerk to the two partners for two months, when the attorney to whom he had been articled died, the Court ordered the surviving partner to refund a portion of the *premium*, although, at the time of payment of such *premium*, his partner was indebted to him, and the premium had been set off in account between them (*r*).

*Affidavit of Service.*] Before admission, the clerk, or the attorney to whom he was bound, must make an affidavit that the clerk "hath actually and really served and been employed by such attorney, or his agent, during the whole of the five years;" and must file such affidavit with the Secondary (*s*).

*Notice of intention to apply for Admission.*] Every person intending to apply for admission as an attorney of this Court (not being an attorney of any other Court) shall, during one full term previous to the

(*m*) 22 *G.* 2, c. 46, s. 9; and see *Carter's case*, 2 *W. Bl.* 957.

(*n*) *Ex p. Rouse*, 2 *Chit. Rep.* 61; and see *Ex p. Unthank*, 2 *M. & P.* 453, ante 17.

(*o*) *Anon.* 1 *Chit. Rep.* 558; 2 *Chit. Rep.* 62, *S. C.*

(*p*) 2 *Barnard.* 227; and see 1 *Id.* 331.

(*q*) See *Ex p. Prager*, 3 *B. & A.* 257; 1 *Chit. Rep.* 694, *S. C.*

(*r*) *Ex p. Bayley*, 9 *B. & Cres.* 601.

(*s*) 22 *G.* 2, c. 46, s. 10; see form of the affidavit, *Chit. Forms*, 4.

term in which he shall apply to be admitted, cause his name and place of abode, and the name and place of abode of the attorney to whom he was articled, written in legible characters, to be affixed on the outside of the Court of King's Bench, in such place as public notices are usually affixed, and also in the King's Bench Office; otherwise he shall not be admitted (t). Where the clerk has served part of the time with one attorney and part with another to whom the articles were assigned, the name of the assignee must be inserted in the notice (u). It seems that if the notice be affixed any time before the sitting of the full Court on the first day of the term, it will suffice to procure the admission on the last day of the term (x).

*Entry of Name, &c. at Judge's Chambers.*] One full term before the term of his application for admission, he shall cause to be entered in a book, kept for this purpose at each of the judges' chambers of this Court, his name and place of abode, and the name and place of abode of the attorney to whom he was articled; otherwise he shall not be admitted. (R. T. 33 G. 3).

*Affidavit of Stamp Duty being paid, and of Enrolment, &c.*] Previous to admission, the clerk must make an affidavit of the stamp duty having been paid; specifying also in such affidavit the name and place of abode of the attorney to whom he was articled at the time of the execution of the articles, as also the time of enrolling or registering the same; and if the person intending to apply for admission be already an attorney of another Court, he must also specify in the affidavit the Court in which he was admitted, and the time of his admission. This affidavit must be filed with the Secondary (y).

*Examination.*] After the expiration of the service, and before the clerk is sworn or admitted, he must be examined, as to his fitness and capacity, by one of the judges. (2 G. 2, c. 23, s. 2).

*Call at the master's office, and get the original affidavit of the execution of the articles which were filed there. Having made the affidavit of service, and the affidavit of the payment of the stamp duties, &c. above mentioned, before a judge, carry these three affidavits, and that part of your articles which was signed by your master, to the judge's chambers; give them to the clerk, who will then introduce you, and your master (if he accompany you) to the judge. If your master do not accompany you, it would be right (if he have not joined in the affidavit of service) that he should certify your service upon the back of the articles, but this is not absolutely requisite. The judge, upon examining these affidavits and the articles, and upon examining you as to your fitness, will, if he deem you duly qualified, grant his fiat*

(t) R. T. 31 G. 3, r. 2; and see 4 T. R. 492; 4 D. & R. 646. See form of the notice, Chit. Forms, 4.

(u) *Ex p. Stokes*, 1 Chit. Rep. 556; *Ex p. Jones*, 1 Dowl. P.C. 439.

(x) *Ex p. Davey*, 4 D. & R. 646.

(y) 34 G. 3, c. 14, s. 3. See the form of it, Chit. Forms, 7.

for your admission. Pay the clerk 10s. 6d. Carry this fiat and the affidavits to the master's office, and give them to the clerk. Pay him 25l. (the amount of the stamp duty upon the admission, 55 G. 3, c. 184), and his fees: he will then engross your admission, and inform you at what time you are to attend in Court to be sworn. If there be any difficulty in obtaining this admission, then a petition with a full affidavit may be laid before the Court (s).

*Swearing.*] Before admission, the clerk must be sworn in Court, (2 G. 2, c. 23, s. 2); and he must attend at Westminster for that purpose, at the time mentioned by the master. The oaths to be administered to him are the oaths of allegiance and supremacy, and the declaration against popery, (7 & 8 W. 3, c. 24; 13 W. 3, c. 6, s. 3); but if he be a catholic, then, instead of these oaths and declaration, he may take the oath in 31 G. 3, c. 32, or 10 G. 4, c. 10. He must also, in either case, take the following oath: "I, A. B., do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability." (2 G. 2, c. 32). If the clerk be a quaker, he may make an affirmation instead of these oaths. (12 G. 2, c. 13, s. 8). The oaths may be taken and the declaration subscribed before a single judge in the bail court. (1 G. 4, c. 55, s. 4).

*Admission.*] After the clerk has taken the oaths, and after the affidavit of execution of the articles, and the affidavit of the payment of the stamp duty, &c. already mentioned, have been read, (22 G. 2, c. 46, s. 4; 34 G. 3, c. 14, s. 3), the admission (being written in English on parchment, and stamped, as is already mentioned), will then be signed by one of the judges, and delivered to him. (2 G. 2, c. 23, s. 2).

If any fraud or false swearing have been practised to obtain the admission, the Court, upon being made acquainted with it, will strike the party off the roll: Thus, where an attorney and clerk joined in the affidavit of the execution of the articles, and the clerk swore to the service under them, and was consequently admitted; it appearing afterwards that the articles were merely collusive, the pretended clerk being in fact an apprentice to a hatter, and his affidavit of service under the articles false, the Court ordered the clerk to be struck off the roll, and granted an attachment against the attorney for the collusion (a). But without some such fraud or false swearing, the admission will in general be conclusive evidence of its having been obtained properly, especially where the attorney was not admitted until after some opposition (b), or where he has been admitted for some length of time, as three years and a half (c).

*Enrolment of name.* *Admission, &c.*] After admission, the name of

(c) Chlt. Sum. Pra. 4.

(a) *Er p. Hill*, 2 W. Bl. 391; *Re Taylor*, 5 B. & A. 538.

(b) *Er p. Bagg*, 2 Bligh. 160; 7 Moore 572, S. C.

(c) *Re Anon.* 2 B. & Adol. 766

the clerk will be entered on the roll by the master; from which it is afterwards copied into the book kept in the master's office (d). If any person practise as an attorney before such admission and enrolment, or if, after being admitted and enrolled, he allow any other person, not duly admitted, to practise in his name, he is liable to a penalty of 50*l.*, recoverable by any person who will sue for the same. (2 *G. 2*, c. 23, s. 24; 22 *G. 2*, c. 42, s. 12).

## 2. Attornies.

*Certificate.*] Between the 15th November and the 16th December in every year, (54 *G. 3*, c. 144), every attorney shall deliver to the commissioners of stamps, or to the officer appointed by them, at their head office in Middlesex, a note in writing, containing the name and usual place of residence of such attorney; and thereupon, upon payment of the duty, he shall receive a certificate under the hand and name of the proper officer. (37 *G. 3*, c. 90, s. 26).

This *duty* is regulated thus: If the attorney reside within London or Westminster, or within the limits of the two-penny post, then, if he have not been admitted three years, he shall pay 6*l.* yearly; but if three years or more, 12*l.* If he reside out of the limits of the two-penny post, and have not been admitted three years, he shall pay 4*l.* yearly; but if three years or more, 8*l.* (55 *G. 3*, c. 184). If the proper duty be not paid, the attorney cannot recover his fees (e).

The certificate in all cases *expires* on the 15th November, (54 *G. 3*, c. 144), without any reference to the day on which it was taken out. If taken out before the 16th December, it will have relation back to the 15th November, and protect the attorney from penalties incurred before that time for having practised without a certificate; but if taken out after the 16th December, it will have relation only to the day on which it issues. (See 37 *G. 3*, c. 90, s. 26; 54 *G. 3*, c. 144, s. 14).

The certificate, when obtained, must be *entered* with the proper officer of the Court in which the attorney was admitted; and such officer shall, on payment of one shilling, enter in the proper book the name and true residence of the attorney, and the date of the certificate. (37 *G. 3*, c. 90, s. 27).

If any attorney shall, in his own name or the name of another, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any Court holding pleas where the debt or damage shall amount to 40*s.* or more, for fee or reward, or shall act in Court as an attorney, without having first *obtained and entered* his certificate, as above directed, or shall deliver in a false or fictitious place of residence, with intent to evade the payment of the higher duties, he shall forfeit 50*l.*, and be incapable of maintaining any action for fees for prosecuting or defending suits, &c. without having obtained a certificate, as aforesaid. (37 *G. 3*, c. 90, s. 30). This, however, does not, it seems, extend to actions in which the attorney is

(d) See *Rex v. Crossley*, 2 *Exp.* 527, and 2 *G. 2*, c. 23, s. 18; Tidd. 9th ed. 71.

(e) *Filcher v. Wilkes*, Chit. Col. Stat. 78.

himself a party (*f*); nor to suits in the sheriff's court, although prosecuted there by virtue of a writ of *justicies*, for more than 40*s.* (*g*). It has been doubted whether an attorney is liable to distinct penalties for each step he takes in a cause, during the time he is without his certificate, or for one penalty only for all the proceedings he takes in it (*h*). Where two attornies are in partnership, both must take out and enter their certificates (*i*); and if both neglect to do so, they must be sued separately, and not jointly, for the penalties (*k*). A common informer may sue for the penalty (*l*). But it may be necessary to observe, that although an attorney renders himself liable to a penalty for thus practising without a certificate, the proceedings taken by him are not deemed void or irregular on that account; for the interests of the client are not to suffer by the misconduct of his attorney, and a party is not bound to inquire and ascertain whether his attorney is properly qualified before he employs him (*m*). This might be otherwise, however, where it could be clearly shewn that the party, when he retained the attorney, knew he had not taken out a certificate. Nor is it a ground of objection to bail, that the attorney has not taken out a certificate (*n*). And the plaintiff's cause having been conducted by an attorney who has not taken out his certificate, or even by a person who is not an attorney, does not, it seems, deprive the plaintiff of his right to full costs against the defendant (*o*). It has been decided, however, in a late case, that a warrant of attorney executed by a defendant in custody on *mesne* process, in the presence of and attested by an attorney who had not taken out his certificate within a year, was invalid (*p*).

If an attorney neglect (*q*) to take out his certificate for one whole year, he shall thenceforth be incapable of practising in Court, either in his own name, or in that of any other person; and his admission shall be deemed void (*r*): but the Court may order him to be re-admitted, upon payment of all arrears of duty, since the expiration of his last certificate, and of such further sum, by way of penalty, as the Court shall think proper. (37 *G. 3*, c. 90, s. 31). If an attorney so neglects to take out his certificate for the space of one whole year, he is liable, under the 37 *G. 3*, c. 90, s. 30, (*ante*, p. 23), to a penalty for practising during that period, although he regularly take it out afterwards (*s*).

(*f*) *Prior v. Moore*, 2 M. & S. 605; *Skirrow v. Tugg*, 5 M. & S. 281.

(*g*) *Cross v. Kaye*, 6 T. R. 653.

(*h*) *Edmonson v. Davis*, 4 Esp. 14.

(*i*) *Id.*

(*k*) *Davis v. Edmonson*, 3 B. & P. 382; *Barnard v. Gostling*, 1 New Rep. 245; overruling 2 East, 563, S. C.

(*l*) *Barnard v. Gostling*, 1 New Rep. 245; overruling 2 East, 563, S. C.

(*m*) *Welch v. Pribble*, 1 D. & R. 215; *Reader v. Bloom*, 10 Moore, 261; 3 Bingham, 9, S. C.

(*n*) *Anon.* 2 Chit. Rep. 98.

(*o*) *Reader v. Bloom*, 10 Moore, 261;

3 Bingham, 9, S. C.; *Anon. v. Sexton*, 1 Dowl. P. C. 180.

(*p*) *Verge v. Dodd*, Tidd's Supplement, 57.

(*q*) The word "neglect" here used imports "culpability," per Abbott, C. J., 2 D. & R. 239.

(*r*) See *Skirrow v. Tagg*, 5 M. & S. 281. As to the evidence of his not having taken out his certificate, &c., see *Barre v. Whale*, 5 B. & Cres. 34, 7 D. & R. 512, S. C.

(*s*) *Stack v. Williams*, Exch. Nov. 1832.

The practice as to the *re-admission* of an attorney, who has not taken out his certificate during one whole year, is thus: Where the attorney *has not practised* on his own account since the expiration of his last certificate, the Court, upon application, and upon affidavit of the payment of the duty on the articles, the admission under them, and up to what time the attorney obtained his certificate, and stating the reason (as illness, absence abroad, embarrassments, or poverty, &c.) (t) of his not having continued to take out his certificate, the manner in which he has since been employed, and that the usual notices have been affixed, &c., in the same manner as upon an original admission, (*ante*, 21), will make a rule that he be re-admitted, without payment of fine or arrears of duty (u). And the same where the attorney has not practised since his admission (x), except the affidavit in that case is somewhat different (a). But where the attorney *has practised* on his own account since the expiration of his certificate, the Court will not order him to be re-admitted, except upon the terms of his paying all arrears of duty, and a fine, which is usually 5*l.* or less; and in this case, the Court also will require to be satisfied by the affidavit that the party's not having taken out his certificate arose from the mere neglect of himself or his agent (z), and not from any wilful omission or improper motive (a). The only exception which has been made so as to dispense with the usual term's notice before making this application, is where the party has continued to practise, having reason to suppose that his agent, or some other person, has taken out a certificate for him (b). Pecuniary difficulties, or illness (c), or absence abroad (d), will not dispense with such notice. *The rule, upon this application, is in the first instance only a rule nisi. On its being made absolute, it is usual and proper to take it to the master's office, and get it entered there.* A Judge will not entertain the application at chambers (e). When an attorney, having ceased to take out his certificate, is off the roll, it is not usual to expunge his name; but when a rule for re-admission is presented at the office, a memorandum of such re-admission is prefixed to the party's name on the roll. It is settled, however, that when the rule for his re-admission is obtained, he may practise, and sue for business done after the obtaining it, although before he has caused his re-admission to be entered at the master's office (f).

Indemnity acts are occasionally passed, to prevent the neglect of the attorney to take out his certificate vitiating the service of the clerk. (*See* 1 *W. 4*, c. 62, s. 26). Indemnity acts are also occasionally passed, to relieve the attorney himself who has neglected to take out his certificate. (*See* 1 *W. 4*, c. 26, s. 6).

(t) *Ex p. Richards*, 1 Chit. Rep. 101, 102; *Ex p. Cunningham*, 1 Bligh. 91, 7 Moore, 410, S. C.

(u) *Ex p. Clarke*, 2 B. & Ald. 314; *Ex p. Calland*, Id. 315; *Ex p. Mateon*, 1 Chit. Rep. 102, 2 D. & R. 238, S. C.; *Ex p. Thompson*, 2 Dowl. P. C. 160.

(x) *Ex p. Davis*, 1 Chit. Rep. 729.

(a) *Ex p. Jones*, 2 B. & Ald. 314; *Re Winter*, 8 Taunt. 129; *Ex p. Jones*, 2 Dowl. P. C. 194.

(a) See forms of affidavit and no-

tice, Chit. Forms, 9, 11; and of the rule, Id. 11.

(b) *Ex p. Bartlett*, 1 Chit. Rep. 7, 207; *Ex p. Winter*, 1 B. & Ald. 189; *Ex p. Jones*, 4 Moore, 347; *Ex p. Vaughan*, Tidd, 8th ed. 70.

(c) *Ex p. Bartlett*, 1 Chit. Rep. 207.

(d) *Ex p. Watson*, 2 Chit. Rep. 208.

(e) *Ex p. Owen*, 1 Dowl. P. C. 511.

(f) *Coren v. Sharp*, 1 B. & Adol. 386, see form of rule there.



*Entry of name in the book at the King's Bench Office.*] Every attorney practising in this Court, and residing in London or Westminster, or within two miles thereof, shall, in a book to be kept for that purpose in the master's office, enter his name, and his place of abode, or some other place where he may be served with notices, summonses, orders and rules; and he shall make the like entry as often as he changes his place of abode, or the place where he may be so served with such notices, &c. (*R. H. 8 G. 3; see post, 29*).

*His admission in other Courts.*] An attorney in this Court may be admitted a solicitor in any of the Courts of equity, without payment of stamp duty; (2 G. 2, c. 23, s. 20); so a solicitor in equity may be admitted an attorney of this Court. (22 G. 2, c. 45, s. 15). And by 1 W. 4, c. 70, s. 10, attornies of the Courts of King's Bench and Common Pleas may be admitted and practise in the Exchequer. Also, an attorney, admitted in any of the Courts at Westminster, may practise in an inferior court, provided he is in other respects qualified by the custom of the place. (6 G. 2, c. 27, s. 2).

*Practising in the name of another, or in a court in which he is not admitted.*] An attorney of any one court of Westminster may practise in any of the other courts there, in the name of an attorney of such other court, provided he have a consent in writing signed by such attorney to do so; (2 G. 2, c. 23, s. 10); and provided both attornies have regularly taken out and entered their certificates. (25 G. 3, c. 80, s. 8). But this shall not extend to permit attornies of the courts of great sessions in Lancaster or Durham, or other inferior courts in England, to practise in the courts at Westminster, either in their own name, or the name of any other person. (34 G. 3. c. 14, s. 4). Even where the consent was not in writing, the Court held that a demand of costs by an attorney prosecuting an action here in the name of another was sufficient to ground an attachment (*h*). But where there was no consent whatever, as where a person put an attorney's name to process without his authority, the Court set aside the proceedings for irregularity, and granted an attachment against the person who had thus acted (*i*). And in a late case in the Common Pleas, where process appeared to be sued out in the name of A. by B., neither of whom were attornies of that Court, and had no authority of any other attorney to act in his name, the Court set aside the proceedings, and ordered A. and B. to pay the costs (*k*).

If an attorney acts in a Court of which he is not admitted, proceedings will be stayed, and he will be ordered to pay the costs; and it is not too late to apply even after issue joined and notice of trial given (*l*). And he could not maintain an action for his fees, or even for money out of pocket; neither has he any lien for his costs. or for money disbursed (*m*).

*Allowing an unqualified person to act in his name.*] If an attorney allow an unqualified person to act in his name, or shall in any man-

(h) Say. 95.

(i) *Oppenheim v. Harrison*, 1 Bur.

20; *Hopwood v. Adams*, 5 Bur. 2660.

(k) *Hatchins v. Edwards*, 4 Moo. 603.

(l) *Constable v. Johnson*, 1 Dowl. P. C. 593; see *Miller v. Towlers*, Peake,

109; *Thwaiter v. Mackinson*, 1 M. & M. 199; *Id.* 329; 2 M. & M. 33.

(m) *Latham v. Hide*, 1 Dowl. P. C. 594, 1 C. & M. 128, S. C.; *Vincent v. Holt*, 4 Taunt. 452.

ner act as agent for such person, the Court, upon application and affidavit of the facts, may order the attorney to be struck off the roll, and may commit such unqualified person to the prison of the court for any time not exceeding one year (*l*). Where a bailiff had written to an attorney for writs, which the latter sent, without knowing any thing of the parties or circumstances; but the bailiff had never represented himself, or been considered as an attorney, nor looked for any profit upon the law proceedings; the Court held, that, although this was not a case within the statute, yet that it was a most improper practice, which the Court, in virtue of its general jurisdiction over attornies, would punish severely (*m*). But the Court of *Common Pleas* refused to strike an attorney off the roll, on an affidavit which stated, that a person who had lately been his clerk, and who lived at a town eight miles distant from the residence of the attorney, and carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market days, and then transacted all his business at an inn; on the ground that it should have been shewn that such person either participated in the profits, or carried on business on his own account (*n*).

*Agents to attornies.*] Attornies in the country usually employ others in town as their agents. In such cases, all notices, &c. relative to business done in town (*o*), such as a demand of declaration (*p*), notice of set off (*q*), notice of trial or of executing a writ of inquiry (*r*), or of continuance of inquiry, (*R. H. 2 W. 4, reg. 57*), must be served on the agent in town; so, the issue must be delivered to him (*s*). But notice of trial on an old issue may be given to the agent in town or to the attorney in the country; so may a countermand of notice of trial (*t*), or inquiry, unless otherwise ordered by the Court or a Judge. (*R. H. 2 W. 4, reg. 57.*)

The attorney is bound by the acts of this agent: thus, where the plaintiff's agent had given the defendant time to plead, and the attorney having in the mean time come to town, demanded a plea, and signed judgment, the Court upon application set aside the judgment for irregularity (*u*).

The attorney is also answerable for the mistakes or negligence of this agent; thus, where a plaintiff obtained a verdict, in consequence of the defendant's agent not having informed the defendant of his having been served with notice of trial; the Court held that the attorney was liable for this neglect of the agent (*w*). So where an agent in town took money out of Court, which had been paid irregularly, the Court held, that the plaintiff was bound by the act of

(*l*) 22 G. 2, c. 46, s. 11; and see 2 G. 2, c. 23, s. 17; 22 G. 2, c. 42, s. 12. *Re Jackson & Wood*, 1 B. & C. 270; *Re Clark & others*, 3 D. & R. 260; *Re Jaques*, 2 D. & R. 64.

(*m*) *Ex p. Whotton*, 5 B. & Ald. 824.

(*n*) *Ex p. Garbutt*, 9 Moore, 157; 2 Bingh. 74, S. C.

(*o*) *Griffiths v. Williams*, 1 T. R. 711.

(*p*) *Elwood v. Elwood*, Barnes, 311.

(*q*) *Pr. Reg.* 280.

(*r*) *Hayes v. Perkins*, 3 East, 568.

(*s*) *Hansfoot v. Duke*, Barnes, 251.

(*t*) *Tugburn v. Havelock*, Bar. 304.

(*u*) *Wallace v. Willington*, Bar. 256.

(*w*) *Collins v. Griffin*, Barnes, 37.

the agent, and the irregularity thereby waived (x). But payment of a debt to the agent is not in law a payment to the attorney's client, as a payment to the attorney himself would have been, unless indeed the attorney have given the agent a special authority to receive the money (y). Nor will an agent be allowed a lien upon money recovered by him in a suit for the client (z), beyond the amount of his charges for agency in that particular suit (a).

An attorney employing an agent to do business for his client is *prima facie* liable to the agent for his bill, although the latter knew that the business was done for the client; but to whom the credit was given is a question for the jury (b).

An attorney, acting as agent for an unqualified person, renders himself liable to be struck off the roll. (*Ante*, 26, 27).

*Attorney, prisoner.*] If an attorney be a prisoner within any gaol or prison, or the rules thereof, he shall not commence or prosecute any action (even in a county court) (c) in his own name or in the name of another, under pain of being struck off the roll; and any attorney allowing him to sue in his name shall incur the like penalty. (12 G. 2, c. 13, s. 9). But this does not extend to suits commenced previously to his imprisonment; (*Id.* s. 14); and where an attorney commenced an action before his imprisonment, the Court held that he might, during his imprisonment, commence an action upon the bail bond (d). So an attorney, although a prisoner, may defend an action; for the statute extends only to commencing and prosecuting (e); or he may commence an action at his own suit; for the statute is confined to actions commenced and prosecuted by him for his clients (f).

An attorney in custody, also, thereby loses his privilege of not being holden to bail, and may be sued as in ordinary cases against prisoners (g).

*Service of notices, &c. upon attorneys.*] If the attorney practise in this court, and reside in London or Middlesex, or within ten miles thereof, all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served, if a copy thereof shall be left at the place stated in the book at the master's office (*see ante*, p. 26), with any person resident at or belonging to such place; and if the attorney have not entered his name and place of abode, &c. in the said book, then the fixing up of any notice, or of the copy of any summons, order, or rule, for such attorney in the King's Bench office

(x) *Griffiths v. Williams*, 1 T. R. 710.  
(y) *Yates v. Frecklington*, 2 Doug. 323.

(z) *Moody v. Spencer*, 2 D. & R. 6.  
(a) *White v. Royal Exchange*, 1 Bing. 21; 7 Moore, 249, S. C.; and *see Bray v. Hine*, 6 Price, 213; *Taunton v. Goarth*, 6 D. & R. 384.

(b) *Service v. Whittington*, 2 B. &

Cres. 11; 3 D. & R. 135, S. C.

(c) *Re Flint*, 2 D. & R. 406; 1 B. & C. 254, S. C.

(d) *Whotham v. Needham*, Barnes, 41.

(e) *Longman v. Rogers*, Willes, 238, Barnes, 263, S. C.

(f) *Kaye v. Denew*, 7 T. R. 671; and *see Prior v. Moore*, 2 M. & S. 605.

(g) *Boyle v. Wilson*, 4 B. & A. 83.

shall be deemed a sufficient service, unless the matter be such as shall require a *personal* service (h).

No rules, orders or notices, however, shall be delivered or served later than 9 o'clock at night; and delivery or service after that hour shall be void. (*R. H. 2 W. 4, reg. 50*). But other proceedings or pleadings may, it seems, in this Court, be delivered or served as late as, but not later than 10 o'clock. (*R. M. 41 G. 3*).

*Indorsement of name of attorney on mesne process, and stating place of abode, &c. of client.*] Writs of summons, capias, and detainer must be indorsed with the name and place of abode of the attorney (if any) actually suing out the same, and if such attorney be not an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court in whose name the writ is taken out (i): and when the attorney actually suing out the writ sues out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country must also be indorsed on the writ. (*R. M. 3 W. 4, reg. 9*). The attorney whose name is indorsed on the writ must, on demand in writing (k) made by or on behalf of the defendant, immediately declare whether the writ was issued by him or with his authority or privity; and if he answers in the affirmative, then he may by order of the Court or a Judge, be compelled to declare in writing (k), within a time to be allowed by such Court or Judge, the profession, occupation, or quality and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which the writ issued; and if such attorney declares (k) that the writ was *not* issued by him nor with his authority or privity, the Court or a Judge may, if it appear reasonable so to do, make an order (k) for the immediate discharge of any defendant arrested on such writ, on entering a common appearance, (*2 W. 4, c. 39, s. 17*), and may order a stay of proceedings until further order. (*R. M. 3 W. 4, reg. 14*). As to one attorney's improperly practising in the name of another; see *ante*, p. 26.

Independently of these provisions, an attorney may be compelled by the Court or a Judge to disclose the place of his client's residence, if the application be made in an early stage of the cause (l), and where an attorney under such circumstances refused to comply with a Judge's order upon the subject, the Court allowed the defendant to *nonpross* the action, ordered the attorney to pay the costs, and awarded an attachment against him for the nonpayment of them (m). So where a defendant pleaded non-joinder of defendants in abatement, the Court upon application ordered the defendant's attorney to furnish the plaintiff with the places of abode and additions of the parties not joined, or that in default thereof the plea should be set aside (n). An

(h) *R. H. 8 G. 3*; see *Ward v. Nethercole*, 7 Taunt. 145; *Re Sandys*, 1 Dowl. P. C. 362.

(i) *2 W. 4, c. 39, s. 12*; see the forms, *Chit. Forms*, 40.

(k) See a form, *Chit. Forms*, 42, 43.

(l) *Johnson v. Birley*, 5 B. & Ald. 540, 1 Dowl. R. 174, S. C.

(m) *Gynn v. Kirby*, 1 Str. 402.

(n) *Taylor v. Harris*, 4 B. & Ald. 93.

attorney, however, cannot be compelled to disclose the place of his client's residence after verdict (*o*).

*Deeds, writings, monies, &c. in his hands.*] If writings come into the possession of an attorney in the way of his business, the Court upon application will order him to deliver them up, upon satisfaction of his lien (*p*), even although they come into his hands as steward of a court and receiver of rents (*q*). It seems, however, that he has no lien upon them for any other debt but costs (*r*). If it appear that a third person is interested in them, the Court will take a security from the person to whom they are to be delivered, to produce them on demand, for the inspection of such third person (*s*). But where it appeared that the attorney held the papers merely as trustee, the Court of Common Pleas refused to order him to deliver them up (*t*); and in all other cases (with the exception of that of the steward of a manor, above mentioned, or the like,) where papers come into an attorney's possession, upon any other account, or in any other manner, than in the way of his profession, the Court will not interfere (*u*). Also, where the motion was, not only that the attorney should deliver up papers which he held as receiver of an estate, but also that he should give an account on oath of his receipts and payments in respect of a certain mortgaged estate, the Court refused to grant an order, saying that this was matter for a bill in equity, and not for a summary application to a court of law (*w*). Upon the whole, the rule upon this subject seems to be, that where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to deliver up papers, &c., or to execute a trust reposed in him; but where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, the Court will exercise this summary jurisdiction. Therefore, where an administrator employed an attorney, as his attorney and agent, to get in the debts due to the intestate's estate: the Court, upon application, granted a rule calling upon the attorney to furnish a bill of costs for the business thus done, and also an account of the money received and paid by him on account of the administrator, to pay over the balance, and to deliver up all deeds, papers, &c.; although the attorney had not been employed by the administrator in prosecuting or defending any action, suit, or other law proceed-

(*o*) *Hooper v. Harcourt*, 1 H. Bl. 534; *Braceby v. Dalton*, 2 Str. 705; *Shindler v. Roberts*, Barnes, 126.

(*p*) *Goring v. Bishop*, 1 Salk. 87; *Say*, 135; *Strong v. Howe*, 1 Str. 681; 8 Mod. 330. S. C.; *Anon.* 12 Mod. 516; *Ex p. Lowe*, 8 East, 237; *Duncan v. Richmond*, 7 Taunt. 391; 1 Moore, 99, S. C.; *De Woolf v.* —, 2 Chit. (8).

(*q*) *Hughes v. Mayre*, 3 T. R. 275; *Marshall's case*, 2 W. Bl. 912; *Ex p. Grubb*, 5 Taunt. 206.

(*r*) *Lawson v. Dickenson*, 8 Mod. 306.

(*s*) *Hughes v. Mayre*, 3 T. R. 275.  
(*t*) *Pearson v. Sutton*, 5 Taunt. 364; and see *Duncan v. Richmond*, 7 Taunt. 391; 1 Moore, 99, S. C.; *De Woolf v.* —, 2 Chit. Rep. 68.

(*u*) *Ex p. Moron*, 1 Dowl. P. C. 6; *Goring v. Bishop*, 1 Salk. 87.

(*w*) *Cocks v. Harman*, 6 East, 404; 2 Smith, 409, S. C.

ing(x). In a late case it was decided that the Court would not compel an attorney to pay a sum of money he had received in his character of attorney; he having, after the receipt of the money, become bankrupt, and obtained his certificate (y). *If there be a cause in Court, it has been decided that the papers may be obtained upon a Judge's summons; otherwise there must be a motion in Court for a rule to shew cause (z).* But it should seem, from practice, that the application in either case may be made before a Judge at chambers. An attorney, when ordered to deliver up the papers of his client, must deliver up the drafts and copies of deeds, &c., for which he has charged and been paid, as well as the deeds, &c., themselves (a). As to compelling an attorney to refund monies, &c., see post, 50.

*Privileges of attornies.]* Attornies are exempted from serving all offices, where personal service is required, even although imposed by act of parliament, and in the most comprehensive terms (b); as the offices of constable (c), overseer of the poor (d), tything men, offices under the commissioners of sewers, collectors of subsidies, watch and ward, &c. (e); and corporation offices, such as sheriff, &c., even although the attorney be resident in the corporation town (f); but they are not privileged from being balloted for the militia, for they can pay for substitutes (g).

An attorney has the privilege in all personal actions, except in actions against attornies of his own Court, of suing in his own Court, and laying and retaining the venue in Middlesex (h). An attorney may file declarations, paying 2s. each term, and examine the files gratis. (R. M. 15 C. 2, r. 3).

As defendants, they cannot in general be arrested on mesne process (i). And formerly, they must have been proceeded against by bill, in the Court in which they practised; but now, by the 2 W. 4, c. 39, they may be proceeded against as common persons, and this, it should seem, in either of the three superior Courts, though their privilege from arrest remains as before. An attorney has no privilege against a foreign attachment (k).

Also, an attorney who has left off practice (l), or is in prison for debt (m), is not entitled to the privileges he would otherwise enjoy; for the privileges of an attorney continue only whilst he is a practis-

(x) *Re Aitken*, 4 B. & Ald. 47.

(y) *Culliford v. Warren*, 8 B. & C. 220. As to compelling a surviving partner of an attorney to refund monies paid on articles of clerkship, see ante, p. 20.

(z) MS. E. T. 1814.

(a) *Ex p. Hargfall*, 7 B. & C. 528, 1 Man. & Ry. 308, S. C.

(b) *Gerard's case*, 2 W. Bl. 1126.

(c) *Res v. Routledge*, 2 Doug. 538; *Gerard's case*, 2 W. Bl. 1126.

(d) *Gerard's case*, 2 W. Bl. 1126; *Ex p. Jefferies*, 6 Bingh. 195.

(e) *Gerard's case*, 2 W. Bl. 1126.

(f) *Mayer of Norwich v. Berry*, 1 W.

Bl. 636, 4 Bur. 2109, S. C.

(g) *Gerard's case*, 2 W. Bl. 1126; see *Evenden's case*, 2 Str. 1143, contra.

(h) This privilege is not taken away by the 2 W. 4, c. 39, ss. 1, 2, *Meggison v. Cole*, MS. K. B. 11th June, 1833; see *Burn v. Pamore*, 1 Dowl. P. C. 17; but he must sue in person, and not by another attorney.

(i) See post, Vol. 2, Book 3, c. 3, s. 2.

(k) *Ridge v. Hardcastle*, 8 T. R. 417.

(l) *Goldsmith v. Baynard*, 2 Wils. 232.

(m) *Byles v. Wilton*, 4 B. & Ald. 86, ante, p. 28.

ing attorney (*n*); and it has been ruled that an attorney who had not practised for several years might be arrested, though, after suing out the writ, and before the arrest, he re-commenced his practice and took out his certificate (*o*). But the omitting to take out his certificate does not deprive an attorney of his privileges (*p*); unless indeed he omit to do so for one whole year, in which case he ceases altogether to be an attorney. (*Ante*, 24).

Where an attorney's certificate having been, by his agent's mistake, filed in the Court of King's Bench, in which Court he had not been admitted, instead of the Court of Common Pleas; and he, being sued for a debt in an inferior court, sued out a writ of privilege from the Common Pleas, that Court ordered it to be quashed, and a *procedendo* to be issued (*q*).

As to how far he is subject to the jurisdiction of courts of requests, &c., see *post*, Vol. 2, Book 4, c. 30, 874. \*

An attorney is not bound, nor indeed will he be permitted, to disclose in evidence any matter communicated to him as an attorney by his client (*r*); and this although no suit was commenced at the time of the communication (*s*).

[*Disabilities of attornies.*] An attorney cannot be sheriff, under-sheriff, deputy to an under-sheriff, (22 G. 2, c. 45, s. 14), sheriff's clerk, receiver, or sheriff's bailiff, whilst he continues to practise as an attorney. (1 H. 5, c. 4). Nor can he, whilst he continues to practise as an attorney, be a justice of peace (*t*); nor clerk of the peace, or his deputy; (22 G. 2, c. 45, s. 14); nor commissioner of the land tax, unless he possess 100*l.* *per annum*; (30 G. 2, c. 3, s. 87), &c.; nor can he be lessee in ejectment (*u*); nor bail (*v*), except in criminal cases (*x*). And by the rule of H. T. 2 H. 4, r. 13, "if any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be put in in the mean time."

### 3. Attornies, appointment of, to sue and defend, &c.

[*Suing or defending by attorney.*] At common law, the parties in the action were obliged to appear in court in person, unless allowed by a special warrant from the crown, called a *dehimus potestatem de attor-*

(*n*) *Brooke v. Bryant*, 7 T. R. 25.

(*o*) *Id.* 7 T. R. 26; see also *Dyson v. Birch*, 1 B. & B. 4.

(*p*) *Skirrow v. Tagg*, 5 M. & Sel. 281;

*Prior v. Moore*, 2 M. & Sel. 605.

(*q*) *Nixon v. Hewitt*, 10 Moore, 270.

(*r*) *Arch. Pl. & Ev.* 388; 1 Phil. Ev.

140; *Roscoe, Evid.* 91; and see cases

collected in 2 Burn, J. (8), ed. 26;

*Brough v. Corderke*, 1 M. & Rob. 182;

*Clegg v. Porell*, *Id.* 228; *Greenhaugh v.*

*Gaskell*, Westminster, Jan. 31, 1833. *cor.* Lord Chancellor.

(*s*) *Clark v. Clark*, 2 M. & Mal. 3.

(*t*) 5 G. 2, c. 18, s. 2; see *Duffey v. Oakes*, 3 Taunt. 166.

(*u*) R. M. 1634, s. 1; 2 Doug. 466.

(*v*) R. M. 1654, s. 1; M. 14 G. 2; 2 Doug. 466; also see *Bologne v. Fautrin*, 2 Cowp. 828.

(*x*) 2 Doug. 467.

*nato faciendo*, to appoint an attorney; or unless after appearance they had appointed a deputy, called a *Responsalis*, to act for them, and which the Court allowed them to do in some instances. But now a general liberty is given to the parties in an action to appear by attorney (*y*); excepting in the cases of infants, idiots, and married women. Infants sue by *prochein amy*, or guardian, and defend by guardian. (*See post*, Vol. 2, Book 3, Chap. 7). Idiots must sue and defend in person; and yet lunatics of full age appear by attorney (*z*). Married women also must appear in person (*a*); but when a husband and wife are sued jointly, they may appear by attorney, for the husband is capable of appointing an attorney for both (*b*). Corporations, it should be observed, cannot sue or defend otherwise than by attorney, which attorney must be appointed under their common seal (*c*). The statutes, however, giving the above-mentioned general liberty to parties to appear by attorney, do not prevent parties to an action from suing and defending in person, if they think proper to do so (*d*).

*Attorney, how appointed.*] An attorney, regularly, should be appointed by a warrant in *writing*, authorizing him to prosecute or defend the suit in question, for and on behalf of the person appointing him; and it is recommended that he should, in all cases, have such written authority (*e*). Yet a verbal authority is considered sufficient to support a judgment (*f*); in fact, in practice, no other than a verbal authority is scarcely ever given by the client to the attorney, or indeed required by the latter; except, perhaps, in cases where the attorney may be fearful of his client's afterwards disclaiming the authority, and may on that account require a warrant or other authority in writing, to serve as evidence of his retainer. An undertaking by a third person to pay an attorney the expenses of business to be done for another, must, by the Statute of Frauds, in general be in writing (*g*). In a case where a plaintiff, not being able to find an attorney willing to undertake his cause, applied to the Court to appoint one for him, the Court is said to have appointed an attorney nominated by him, to prosecute his suit (*h*). Yet in another case where a motion was made to compel an attorney to appear for a party, the Court held that he was not compellable to appear for any one, unless he take his fee, or back his warrant (*i*).

*Warrant, when to be filed and entered.*] At common law, the war-

(*y*) Stat. Westm. 2, (13 Ed. 1, c. 10); 7 R. 2, c. 14; 15 H. 6, c. 7; 29 EL. c. 5; 2 Inst. 376; Fitz. N. B. 25; Gilb. C. B. Chap. 8.

(*z*) 4 Co. 124. b.; 2 Saund. 333, n. 4; see Tidd, 9 ed. 93, n. 6.

(*a*) Co. Lit. 135; *Oukle v. Sansom*, 3 Taunt. 261; see *post*, Vol. 2, Book 3, Chap. 8.

(*b*) *Foswist v. Tremaine*, 2 Saund. 213.

(*c*) Co. Lit. 66. b., *post*, Vol. 2, Book

3, Chap. 2.

(*d*) *La Grue v. Penny*, 2 H. Bl. 600; Say. 217; see *Ward v. Nethercote*, 7 Taunt. 145.

(*e*) See *Queen v. Ord*, 3 C. & P. 340, per Lord Tentarden. See the forms of retainer, Chit. Forms, 12.

(*f*) 1 Lil. Pr., reg. 134, 137.

(*g*) *Harber v. Fox*, 1 Stark. N. P. C. 270; *Hellings v. Gregory*, 1 C. & P. 627.

(*h*) *Anon.* 12 Mod. 583.

(*i*) *Anon.* 1 Salk. 87.



warrant authorizing the attorney to act might be filed even after judgment, for its not being filed in time was not assignable as error (*k*). But it seems to have been the intention of the legislature to have altered the law in this respect. By 18 *H.* 6, c. 9, in process of outlawry, the warrant must be entered of record in the same term the exigent is awarded; by 32 *H.* 8, c. 30, ss. 2 & 3, the warrants of attorney must be entered in or before the term in which issue is joined; by 18 *El.* c. 14, s. 3, it must be filed of record; and by 4 & 5 *A. c.* 16, s. 3, the attorney for the plaintiff shall file his warrant with the proper officer, the same term he declares; and the attorney for the defendant, the same term he appears. These several statutes inflict penalties on the attorney for not entering and filing his warrant within the times therein prescribed. Lastly, by *R. M.* 5 *A. r.* 2, defendant's attorney shall, at the time of his appearance, give his warrant to the plaintiff's attorney, who shall file it at the same time he files or ought to file his own, and for which the defendant's attorney shall pay him 4*d.* at the time the declaration is delivered or taken out of the office; and if the defendant's attorney refuse to pay the same, the plaintiff's attorney may sign judgment. But notwithstanding this rule, the Court would not allow the plaintiff to sign judgment upon the defendant's refusing to pay for the warrant of attorney; there is no instance, at least, in modern times, of judgment being signed for such a cause (*l*).

In practice, however, the warrant is seldom if ever filed, or indeed given by the client to his attorney, all that is now done, is, on making up the roll, to enter the warrants for the plaintiff and defendant at the top of it, in pursuance of the rules of *E. T.* 4 *J.* 2, and *H. T.* 2 *W.* 4, reg. 1, s. 1. It has been decided that if a warrant be filed at any time pending the suit (*m*), that is, at any time before final judgment (*n*), it is sufficient; previously to that, the Court will always intend it. And it has even been decided, that although an attorney might have been punishable for not filing his warrant within the time specified in the statutes above mentioned, yet his not having done so was not assignable as error (*o*); and if assigned, the Court would set aside the assignment (*p*); or allow the attorney to file and enter his warrant after error brought (*q*). Moreover, it may, since the 2 *W.* 4, c. 39, be deemed very questionable whether the above statutes are not virtually repealed.

The want of a warrant is aided after verdict, by 18 *El.* c. 14, (and see 32 *H.* 8, c. 30), although not perhaps after judgment by default (*r*). Also the warrant may be amended under *stat.* 8 *H.* 6, c. 12, for any misprision of the clerk (*s*).

(*k*) *Wynn v. Wynn*, 1 *Wils.* 39; but see 41 *E.* 3, 1. b.

(*l*) *O'Neale v. Price*, 4 *T. R.* 370; see *Tidd*, 9 ed. 93.

(*m*) *Duke v. Sponting*, 1 *Wils.* 183; *Noke v. Calderot*, 1 *Str.* 326; *Henriquez v. Dutch E. I. Comp.*, 2 *Str.* 307, 2 *L. Raym.* 1332, *S. C.*

(*n*) *Brooke v. Manning*, *Fitz.* 191.

(*o*) *Coke v. Allen*, 8 *Mod.* 77.

(*p*) *Chartres v. Cusnick*, 1 *Str.* 141.

(*q*) *Calverley v. Breakey*, 2 *Dy.* 10 a; *Killegrove v. Treweymard*, *Id.* 225 a; and see *March*, 121, pl. 201; see also *Bradburn v. Taylor*, 1 *Wils.* 83.

(*r*) See 4 & 5 *A. c.* 16, and *Bradburn v. Taylor*, 1 *Wils.* 83.

(*s*) See *Richards v. Brown*, *Doug.* 114 a.

*Memorandum of Warrant.*] Before the 5 G. 4, c. 41, it was requisite that the warrant should be stamped (t), and no attorney could sue out process, or commence or carry on any suit or other proceedings, or defend, for fee or reward, unless he had delivered a memorandum to the proper officer, containing the names of the parties in the action, with the name of the attorney and agent retained to prosecute or defend, to be filed of record, (25 G. 3, c. 80, s. 13), under the penalty of 5*l.*; (*Id.* s. 16); and the officer who received the memorandum was bound to file it, on penalty of 5*l.*, and insert in it the day of the month he received the same, without any fee. (s. 15). But no action could be staid, or judgment reversed, by reason of any omission or defect in entering or filing this memorandum. (s. 17). So if a defendant, before appearance, confessed the action, or gave a warrant of attorney, the attorney, before he entered up judgment thereon, was bound to give to the proper officer a memorandum of the cognovit or warrant of attorney, under pain of 5*l.* (25 G. 3, c. 80, s. 19). Common appearances, indeed, might be entered by the plaintiff for the defendant, according to the statute, without filing a memorandum for the defendant; (s. 22); though, after such appearance entered, no attorney could plead or carry on any further proceedings for the defendant, until a warrant to defend had been filed, on pain of 5*l.* (s. 23).

Now, however, inasmuch as the stamp duties on warrants of attorney are repealed by the 5 G. 4, c. 41, the filing of this memorandum or minute of the attorney's warrant seems unnecessary, and, at all events, is discontinued in practice.

*When bound to act, &c.*] If he have undertaken to appear, he must enter an appearance accordingly, otherwise the Court will grant an attachment against him, or strike him off the roll (u); the undertaking, however, must be in writing, and signed by the attorney (x). So if he accept a warrant or declaration, or subscribe process, the Court will compel him to appear (y). Nor can he in general retract, after he has once taken upon himself to be attorney for the party (z). And it has been determined in the Common Pleas, that an attorney having improperly quitted his client before trial, could not bring an action for his bill (a). In one old case it was even held that the attorney was bound to proceed for his client, notwithstanding he refused to supply him with money (b). But this, as a general position, is certainly incorrect: and in a very recent case, on an application to the Court of Exchequer for a rule on the part of a plaintiff to compel his attorney to proceed in a cause, or else deliver over the papers to him (c), Bayley, B., expressed himself on this subject, saying, that he was

(t) 25 G. 2, c. 80, s. 1; 44 G. 3, c. 98, Sch. A., &c.; 55 G. 3, c. 184, Sched. Part 2 & 3.

(u) R. M. 1654, s. 10; *Anon.* 6 Mod. 42; *Lorimer v. Hollister*, 2 Str. 693; *Kibbey v. Wepbergh*, 12 Mod. 251; *Hould v. Roberts*, 4 D. & R. 719, post, 39.

(x) *Lorimer v. Hollister*, 2 Str. 693; *Loft*, 192; and see *Stratton v. Bur-*

*ges*, 1 Str. 114; and see further, as to his undertakings, post, 38, 40.

(y) R. M. 1654, s. 10; 1 Lil. Pr. reg. 102.

(z) 1 Sid. 31.

(a) 14 Ves. 272; and see *Id.* 196, 271; 1 Swanst. 1, 3; *Id.* 93.

(b) *Mordcaul v. Solomon*, Sayer, 192.

(c) *Wadsworth v. Marshal*, Exch. 2 June, 1832.

clearly of opinion an attorney was not entitled to abandon a cause, provided he had received the amount of his bill up to a certain period, and it was the wish of his client to proceed to trial. But, in the ordinary course of retaining an attorney, he (*Bayley, B.*) would be very sorry if any rule were to be found which would require or compel an attorney to carry a cause to trial at his own entire cost. It was his opinion that an attorney was entitled to insist that he should be supplied with the money necessary to carry the cause to trial, not only to the amount of costs out of pocket, but the other expenses. There were many causes in which the amount necessary to be advanced for the carrying them on amounted to an enormous sum, which, were it necessary for the attorney to advance himself, would be a case of great injustice, if not of impossibility. But he knew it was the constant practice for advances to be made to attornies on the commencement of proceedings. He was of opinion that an attorney had a right to insist on the advance by his client of the necessary funds if he thought it convenient to do so: *Vaughan, B.* agreed with this opinion. And, in another case, in an action by an attorney for his bill of costs for conducting a Chancery suit, where it appeared that the attorney had conducted the cause up to the time of his obtaining the master's report, and had made repeated but ineffectual attempts to procure money from his client to carry on the proceedings, Lord *Tenterden* said, "It was not to be expected that a solicitor should continue to conduct a cause for an indefinite length of time, after repeated applications for money without effect," and the jury accordingly found for the plaintiff (*d*). The attorney, however, cannot abandon the cause on the ground of want of money, without giving his client reasonable notice of his intention so to do (*e*).

*When and how the client may change his attorney.*] Pending a suit, the client cannot change his attorney, without leave of the Court or a Judge's order; and the attorney newly appointed shall take notice at his peril of the rules to which the former attorney would have been liable had he continued (*f*). To obtain the order to change the attorney, apply to the Court by motion, founded on an affidavit, or, which is more usual, take out a Judge's summons (*g*). When the rule or order (*g*) is obtained, serve a copy of it on the opposite attorney. The rule or order, in such a case, is drawn up, on payment of the attorney's bill, to be taxed by the master (*h*). Upon changing the attorney, it is not necessary to file a new warrant (*i*). The record, however, ought to mention the change, and that it was done by leave of the Court or a Judge (*j*).

(*d*) *Rowson v. Earle*, 1 M. & M. 538; *Merrifield's Law of Attornies*, 181; and see *Mann. Exch. Prac.* 585.

(*e*) *Hoby v. Bull*, 3 B. & Adolph. 350.

(*f*) R. M. 1654, s. 10; *Lil. Prac. reg.* 134, 143; and see *Macpherson v. Rorison*, 1 Doug. 217; *Anon.* 7 Mod. 50; *Kaye v. DeMattos*, 2 W. Bl. 1323; *Powell v. Little*, 1 Id. 8; *Ginders v. Moore*,

1 B. & Cres. 654.

(*g*) See a form of the summons, and order, *Chlt. Forms*, 12.

(*h*) *Macpherson v. Rorison*, Doug. 217; 1 *Lil. Pr. reg.* 141; and see *Lovegrove v. Dymond*, 4 Taunt. 669.

(*i*) *Wood v. Plant*, in error, 1 Taunt. 44.

(*j*) *Anon.* 12 Mod. 440; *Say.* 218.

If a party change his attorney without this leave of the Court, the second attorney shall not be allowed to act; or if he do, the Court will set aside the proceedings for irregularity, or perhaps the opposite party may consider them a nullity (*k*). Thus, a plea put in by a new attorney, without any order for changing the attorney, is irregular, and the plaintiff is not bound to accept such plea (*l*): it seems, however, that the plaintiff would waive the irregularity, by taking the plea out of the office and keeping it (*m*). Where the defendant gave notice of bail by one attorney, and (without obtaining leave to change his attorney) gave notice of justification by another, the Court would not allow the bail to justify (*n*). But where the defendant's attorney refused to proceed to the justification, the Court allowed the bail to appear, and justify by their own attorney (*o*). So, where the defendant's attorney gave notice of bail, and the bail to the sheriff by their attorney gave notice of adding and justifying other bail, the Court held it to be sufficient (*p*). And if the defendant be a prisoner, notice of justification may be given by a new attorney without an order for changing the former attorney (*q*). A party called on to shew cause may oppose the rule by a new attorney without notice to the other party of the order to change his attorney (*r*). So, a plaintiff may sue out execution by a new attorney without an order for changing the old one (*b*). As to a new attorney suing out a *scire facias*, see *post*, 38. Where the plaintiff changed his attorney without leave of the Court, payment of debt and costs to the former attorney was holden a payment to the plaintiff (*t*).

*Continuance of his authority.*] The warrant for his acting continues in force until the end of the suit (*u*); and, according to Lord Coke (*x*), the attorney may sue out execution under it at any time within a year after the judgment, and may prosecute such execution afterwards (*y*); so he may acknowledge satisfaction on the roll, and receive the amount of the debt and costs, &c. (*z*). It should seem, however, that the attorney's authority is at an end on final judgment being signed (*a*), and it has been holden that a party may sue out execution even within the year (*b*), or bring a writ of error (*c*), or enter satisfaction on the roll (*d*), by a different attorney, without an order to change his attorney. The original warrant, however, does

(*k*) See *Ginders v. Moore*, 1 B. & C. 654; *Lovegrove v. Dymond*, 4 Taunt. 669.

(*l*) *Perry v. Fisher*, 6 East, 549; but see 13 Ves. 161, 195.

(*m*) *Margerum v. Mackilwaine*, 2 New Rep. C. P. 509.

(*n*) *Hill v. Roe*, 6 Taunt. 532, 2 Marsh. 257, S. C.; see *Buckler v. Rawlins*, 3 B. & P. 111; *post*, 161.

(*o*) *Haggett v. Argent*, 7 Taunt. 47, 2 Marsh. 365, S. C.

(*p*) *Rex v. Sheriffs of London*, in *Plomer v. Houghton*, 2 B. & Ald. 604, 1 Chit. Rep. 329, S. C.

(*q*) *Keys v. Tavernier*, 1 Chit. Rep.

291.

(*r*) *Lovegrove v. Dymond*, 4 Taunt. 669.

(*t*) *Powell v. Little*, 1 W. Bl. 8.

(*u*) 1 Ro. Abr. 295, pl. 25.

(*x*) 2 Inst. 378.

(*y*) See also Comb. 40; Sty. 426.

(*z*) *Anon.* 12 Mod. 440.

(*a*) *Macbeath v. Cooke*, 1 M. & P. 513, 4 Bingh. 578, S. C.

(*b*) *Tipping v. Johnson*, 2 B. & P. 357.

(*c*) *Batchelor v. Ellis*, 7 T. R. 337; and see *Parsons v. Gill*, 2 Ld. Raym. 896.

(*d*) *Marr v. Smith*, 4 B. & Ald. 466.

not extend to a *scire facias* against the bail (e), or a *scire facias* to revive the judgment (f).

But the warrant may be sooner determined, by the client's obtaining an order to change his attorney (*vide ante*, 36), or by the attorney's death (g). If the attorney die, notice should be given to the opposite party of the appointment of the new attorney, before the latter can proceed in the cause (h). If the party who employed the deceased attorney neglect to appoint a new one after notice, the opposite party may proceed in the action (i).

*Acting without authority.*] If the attorney is a responsible person, and appear without any warrant or authority, it has been said that the Court will look no further, but proceed as if the attorney had been fully authorized, and leave the party to his action against him (k); and the Court have refused to set aside a judgment for the plaintiff, where an attorney had appeared for the defendant without authority, saying that they would never set aside proceedings on that account, where the attorney was a responsible person (l). But, from a more recent case (m) it seems, that if the party applies to the Court in proper time they will protect him. And in another case, where an attorney, under a forged authority, commenced an action for a debt, received the amount of it from the defendant, and paid it over to the person from whom he had the authority, the Court held that this was no bar to an action brought by the real plaintiff for the same debt; that the defendant might recover the sum he had before paid, from the attorney, and the attorney might recover it from the person who had given him the false authority (n). In the same manner, it should seem, in all cases where an attorney acts without authority, and he be not a responsible person, his proceedings shall not prejudice the party for whom he assumes to act. In a late case at *Nisi Prius*, it was held, that if an attorney sue out a writ against A. at the suit of B. without any authority, express or implied, from B. for so doing, and A. pay the costs of such writ to the attorney, A. may recover back the amount of those costs, by bringing an action for money had and received against the attorney; but if the attorney had any authority, either express or implied, from B., to sue out the writ, such action for money had and received will not lie against the attorney, even though B. had no cause of action against A. (o).

#### 4. Attornies, their Duties and Undertakings, &c., and how punished, &c. for Misconduct, or Negligence, &c.

*Duties and undertakings.*] First, as to their duties to the Court. They must attend the Court upon motions, notice being previously given them for that purpose. (*R. E.* 1656; *M.* 1654, s. 10). They

(e) *Burr v. Attwood*, 1 Salk. 89.

(f) *Hussey v. Welby*, Say. 218.

(g) *Lil. Pr. reg.* 141.

(h) *Ryland v. Noakes*, 1 Taunt. 342.

(i) *Sty. Pr. reg.* 13; 2 Keb. 275.

(k) *Anon.* 1 Salk. 86.

(l) *Latuch v. Pasherante*, 1 Salk. 86; *Anon.* 1 Salk. 88, 6 Mod. 16, S. C.; and

see *Chambers v. Donaldson*, 9 East, 471.

(m) *Williams v. Smith*, 1 Dowl. P.C. 632; and see *Doe d. Davies v. Eyton*, 3 B. & Adol. 785.

(n) *Robson v. Eaton*, 1 T. R. 62; and see *Worley v. —*, 12 Mod. 318; *Buckle v. Roach*, 1 Chit. Rep. 193.

(o) *Dupen v. Keeling*, 4 C. & P. 102.

must attend the Judges upon summons. (*R. M. 11 G. 1*). They must attend the master, upon appointments; (*R. H. 15 C. 2*); and they must attend the first appointment, without waiting for a second; or in default thereof the master shall proceed *ex parte* on the first appointment. (*R. H. 32 G. 3*; and see *R. T. 1 W. 4, r. 9*).

Secondly, as to their duties to their *Clients*. An attorney is bound to use skill and care in the management of his client's suits, &c.; and if he commits mistakes inconsistent with ordinary skill, or if, from his negligence, his client sustain any injury, he is liable to make reparation for the damage thereby occasioned (*o*). He is also bound to manage the business intrusted to him with fidelity; and this seems the more necessary, when it is considered that the client is bound by the acts of the attorney. Where an attorney agreed to refer a cause, without the consent or approbation of his client, the Court held that the client was bound by the attorney's act, and refused to set aside the rule of reference (*p*). So where the plaintiff's attorney waived a judgment by default, the Court held that the plaintiff was bound by the waiver, although he wished to insist upon his judgment (*q*). So, a payment to the attorney is considered a payment to the client (*r*); so, a tender to the attorney is a tender to the client (*s*); and upon the same principle, the attorney may acknowledge satisfaction on the record, and his client will be bound by the acknowledgment (*t*). It is the duty of an attorney to communicate personally with his clients, and give his attention to their concerns, so that they may reap the benefit of his advice and judgment (*u*). We have already seen that an attorney cannot in general retract, after he has once taken upon himself to be attorney for the party, unless under circumstances where his client will not supply him with money, &c. (*Ante*, 35, 36).

Lastly, as to his *Undertakings*: We have seen (*ante*, p. 35) that if an attorney undertake to appear for a defendant, or accept a warrant or declaration, or subscribe a process, the Court will compel him to appear, under pain of an attachment, or of being struck off the roll. So, if he undertake to the plaintiff to put in bail for the defendant, the Court will compel him, under pain of attachment, to put in bail, or render his principal (*w*); but if such undertaking have been given to the sheriff or his officer, the Court will not enforce it, because it is void by *stat. 23 H. 6, c. 9* (*x*). And an attorney who stays proceedings upon an undertaking to pay costs, is bound to fulfil his engagement, although his client die before bail is put in (*y*). And, though the undertaking be void by the Statute of Frauds, the Court may, when given by an attorney as such, enforce him to perform it (*z*).

(*o*) See the cases and authorities *post*, pp. 41, 42.

(*p*) *Filmer v. Delber*, 3 Taunt. 486.

(*q*) *Anon.* 1 Salk. 86.

(*r*) *Yates v. Frecklington*, 2 Doug. 622; *Powell v. Little*, 1 W. Bl. 8; *ante*, p. 28.

(*s*) *Crozier v. Pilling*, 4 B. & C. 28.

(*t*) *Anon.* 12 Mod. 440; 1 Ro. Abr. 366.

(*u*) *Hopkinson v. Smith*, 7 Moore, 237; 1 Bingh. 13, S. C.

(*vo*) *Rogers v. Nevill*, 1 T. R. 422; *Sedgworth v. Spicer*, 4 East, 569.

(*z*) *Sedgworth v. Spicer*, 4 East, 569; *Lewis v. Knight*, 1 Dowl. P. C. 261; 1 M. & Scott, 353, 8 Bingh. 271, S. C.; and see *post*, Book 1, Part 1, Ch. 1, s. 6.

(*y*) *Hellings v. Jones*, 10 Moore, 360, 3 Bingh. 70, S. C.

(*z*) *Re Paterson*, 1 Dowl. P. C. 469; *Re Greaves*, 1 Crompt. & J. 374, n.

Where the attornies for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner, it was held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified (a). And where an attorney, in order to get possession of papers belonging to A. B. in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference not revocable, &c.; it was held, that A. B., having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3, c. 121, s. 14, so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference to find security for the performance of the award to the satisfaction of the master (b). Where the defendants' attorney, on their being sued by the plaintiff, undertook, by letter, to procure their signature to a cognovit for payment of debt and costs, which he failed to do, but the plaintiff afterwards said he would proceed with the action; it was held, that it was virtually a waiver of the attorney's undertaking, and that he could not be called on by the Court to perform it (c).

It seems, however, that if the undertaking of the attorney be not given by him as an attorney in a cause, or suit, the Court will not interfere summarily against him and compel him to perform it, and that the party's remedy, if any, against him is by action (d).

*How punished, &c., for misconduct, or negligence, &c.*] The Court has a jurisdiction over attornies, which is exercised according to law and conscience, and not by any technical rules (e). The mode adopted by the Court for the punishment of attornies for misconduct (independently of the client's remedy by action, and where no other method is specifically pointed out by law), is by attachment, and, in very gross cases, by striking them off the roll; and if dismissed by one Court, they shall not afterwards be admitted in any other (f). In some cases, the Court think it sufficient to make the attorney pay the costs incurred by the parties, by reason of his misconduct: thus, for instance, where an attorney put in bail which he knew to be insufficient, and gave notice of their justification, the Court, upon application, ordered him to pay the costs of opposing them (g). Where an attorney obtained a rule nisi on his own affidavit, swearing that no bail to the action had been put in, when, in fact, bail had been put in and just-

(a) *Iveson v. Conington*, 1 B. & C. 160, 2 D. & R. 307, S. C.

(b) *Ex p. Hughes*, 5 B. & Ald. 482.

(c) *Miller v. James*, 8 Moore, 208.

(d) *Walker v. Arlett*, 1 Dowl. P. C. 61; *Northfield v. Orton*, Id. 415; *Ex p. Watts*, Id. 512; *Re Paterson*, Id. 468; *Re Groaves*, 1 C. & J. 374, n.; *Re Bateman*, 2 Dowl. P. C. 161.

(e) *Ex p. Bayley*, 9 B. & C. 691.

(f) *R. M.* 1654, s. 1; *Re Smith*, 1 B. & B. 522, 4 Moore, 319, S. C.; see *Ex p. Hague*, 7 Moore, 64, 3 B. & B. 257, S. C. Unless there is a cause in court, it seems the application cannot be made at chambers, *Ex p. Higgs*, 1 Dowl. P. C. 495.

(g) *Blundell v. Blundell*, 1 D. & R. 142, 5 B. & Ald. 533, S. C.; *post*, 151.

fied, but merely a mistake was made in the filacer's entry, in the Christian name of one of the plaintiffs: the Court discharged the rule, with costs to be paid by the attorney who had so sworn (*h*). So, where an attorney obtained a rule *nisi* on suggestions which were groundless, the Court discharged the rule, and ordered the attorney to pay the costs (*i*). Where an attorney, without any corrupt or unworthy motives, prepared a special case, in order to take the opinion of the Court upon the will of a testator, and suggested several facts which had no foundation: he was holden to be guilty of a contempt, and fined 30*l*. for his offence (*k*). In one case, where it appeared that an attorney kept out of the way, in order to avoid a personal service of a rule for an attachment, the Court are reported to have intimated a doubt of the propriety of his being allowed to remain any longer upon the roll (*l*); but an application to that effect has since been refused (*m*). And the Court will interfere in this summary way, not only in cases where the misconduct of the attorney has arisen in the course of suits, or other regular and ordinary business of an attorney, but where it has arisen in any other matter, so connected with his professional character, as to afford a fair presumption that he was employed in it in consequence of that character (*n*). But it may, perhaps, be laid down as a general rule, that the Court will not interfere in this summary way, where the misconduct complained of amounts to an indictable offence (*o*): though indeed, where an attorney sent letters to a person, threatening him with a prosecution, in order to extort money from him, the Court ordered him to be struck off the roll (*p*). If an attorney sign a fictitious name to a special plea, as that of a barrister (*q*), or sign the name of a barrister, without his knowledge or assent, the Court will strike him off the roll. So, if an attorney knowingly suffers his name to be used by an unqualified person, or knowingly acts as agent for such person (*r*), or otherwise grossly misbehaves himself (*s*), or was fraudulently admitted (*t*), the Court will strike him off the roll. In all cases, this application must be made in a reasonable time after the misconduct took place. In a late case, where an application to strike an attorney off the roll on the ground of misconduct, and the want of regular service in his clerkship, was made three years and a half after he had been admitted, the Court refused to grant it (*u*). And generally, an application to strike him off the roll on the ground of his having been guilty of misconduct previously to his admission cannot be sustained (*x*).

In general, an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of the Court; for want of

(*h*) *Clarke v. Gorman*, 3 Taunt. 402.  
(*i*) *Rolf v. Rogers*, 4 Taunt. 191; and see *Grugren v. White*, *Id.* 881.

(*k*) *Re Elaan*, 5 D. & R. 389, 3 B. & C. 597, S. C.

(*l*) *Anon.* 1 D. & R. 529.

(*m*) *Rex v. Carpenter*, MS. H. 1825.

(*n*) Tidd, 9th ed. 80; *Re Atkin*, 4 B. & Ald. 47; and see *De Woolfe v. —*, 2 Chit. Rep. 68; *Re Knight*, 1 Bingh. 91.

(*o*) *Re Knight and Hall*, 1 Bing. 142;

*Short v. Pratt*, 7 Moore, 424, 1 Bingh. 102, S. C.; *Ex p. Anon.* 2 Dowl. P. C. 110.

(*p*) *Anon.* 1 Dowl. P. C. 174.

(*q*) *Rex v. Southerton*, 6 East, 143.

(*r*) *Smith v. Matham*, 4 D. & R. 738.

(*s*) *Ante*, 26; Tidd, 9th ed. 89.

(*t*) *Potter's case*, Tidd, 9th ed. 89; *Priddie's case*, *Id.*

(*u*) *Re Anon.* 2 B. & Adol. 766.

(*x*) *Ex p. Page*, 1 Bingh. 160.



care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession (y). Thus, if a prisoner be superseded for the attorney's neglecting to charge him in execution, the client may maintain an action against the attorney for the damages arising from such negligence (z). But if he make a mistake in a point of law or practice, where there is a reasonable doubt of the law upon the subject, he is not liable (a). And in a late case, where an attorney took the advice of counsel, who advised him that certain proof was unnecessary, and he, acting upon such advice, did not adduce such proof, and was in consequence nonsuited, it was held that he was not liable (b). Nor is an attorney in a cause liable for the absence, neglect, or want of attention in the counsel engaged in it (c). So, where the client has not in fact been damnified, he cannot in general proceed thus against his attorney; as, for instance, if he had no right or merits in the suit which the attorney was conducting for him (d). And where judgment had been signed for want of a plea, through the negligence of the attorney, but it appeared also that the client actually owed the debt for which he was sued, and consequently was not damnified, the Court refused to interfere (e). Nor will the client be allowed to set up any mistake of his attorney, as a defence to an action brought against him by such attorney for his costs (f), at least, not unless the mistake have had the effect of rendering the proceedings wholly ineffective (g). The Court will not in these cases interfere in a summary way, to make the attorney indemnify his client, unless the case be one of gross negligence, or gross ignorance (h), but will leave the client to his remedy by action. The application must always be made speedily after the misconduct or injury complained of. Where an attorney discharged a person in custody of his client's suit, upon receiving from him a security which he knew at the time to be worth nothing, the Court, upon application, ordered him to pay his client the amount of the debt and costs (i). So, where an attorney neglected to fee counsel, whereby his client was nonsuited, the Court awarded an attachment against him, but ordered it to lie in the office a few days, in order to give him an opportunity to make satisfaction to his client (j). So, where judgment of *nonpros* was signed for the attorney's neglect in not making up the issue, the Court ordered the attorney to pay the costs of the

(y) See *per Curiam*, 6 Bingham 468; and see *Reece v. Rigby*, 4 B. & Ald. 202; *Pitt v. Yalden*, 4 Burr. 2060.

(z) *Russell v. Palmer*, 2 Wills. 325; *Russell v. Stewart*, 3 Burr. 1787; and see *Lee v. Ayrton*, Peake, 119, 2 Lev. 85.

(a) *Pitt v. Yalden*, 4 Burr. 2060; *Baile v. Chandless*, 3 Camp. 17; *Id* 19, S. C.; *Laidler v. Elliott*, 3 B. & C. 738, 5 D. & R. 635, S. C.; *Jacks v. Bell*, 3 C. & P. 316; *Kemp v. Burt*, 1 N. & M. 262.

(b) *Godefroy v. Dalton*, 6 Bingham 460; and see *Kemp v. Burt*, 1 N. & M. 262.

(c) *Lowry v. Guilford*, 5 C. & P. 234.

(d) *Peake*, 162.

(e) *Re Barnes*, Barnes, 38.

(f) *Templer v. McLachlan*, 2 New Rep. 136; *Johnson v. Alston*, 1 Camp. 176; see *vide Swannell v. Ellis*, 8 Moore, 340, 1 Bingham 347, S. C.

(g) *Id.*; see *Montrieu v. Jefferies*, 2 C. & P. 113, Ry. & M. C. N. P. 317, S. C.; *Hopkinson v. Smith*, 7 Moore, 237, 1 Bingham 13, S. C.; *Shaw v. Arden*, 9 Bingham 287; *Hill v. Featherstonhaugh*, 7 Bingham 669.

(h) *Pitt v. Yalden*, 4 Burr. 2061; *Barker v. Butler*, 2 W. Bl. 780; *Lofft*, 188.

(i) *Rex v. Bennett*, Say. 169.

(j) *Rex v. Tow*, Say. 50. See *ante*, 35, 36.

*nonpros* (k). But it may be deemed an invariable rule, that the Court will interfere in a summary way, where the misconduct complained of arises from want of integrity.

Also, where an attorney is charged by affidavit with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the Court, upon motion, will order him to answer the matters of the affidavit. If he positively and unequivocally deny the matters alleged against him, the Court will dismiss the complaint; otherwise they will award the attachment (l). Yet where an attorney, in his answer to interrogatories, fully denied the matter of complaint, but in doing so gave such an account of the transaction in question as was highly incredible, the Court, notwithstanding the denial, granted the attachment (m). But it is only in cases where the attorney's answer to the complainant's affidavit cannot have the effect of criminating him, that you can move that he answer the matters of an affidavit; in all other cases you must move, in the first instance, either for an attachment, or that he be struck off the roll (n). As to the costs in such cases, if the rule be made absolute, the attorney will ultimately have to pay them; if discharged, and there appear to have been no grounds, or very slight ones, for the application, it will be discharged with costs. But if there appear to have been reasonable and probable cause for imputing misconduct to the attorney, although it turn out that there was no actual foundation for the charge, the Court will not in general give him his costs (o).

If any person convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as attorney, solicitor, or agent, in any suit or action, in any Court of law or equity in England, the Judge may transport the offender for seven years, by such ways and under such penalties as felons. (12 G. 1, c. 29). Where an attorney had been convicted of larceny, the Court ordered him to be struck off the roll, although the conviction had taken place five years before, and no subsequent misconduct was attributed to him; but the Court held that the conviction rendered him an unfit person to practise as an attorney (p). But a conviction for a conspiracy is not of itself sufficient ground for striking an attorney off the roll: the conspiracy must have been of an aggravated nature (q).

If an attorney be struck off the roll of one Court, he may, upon the same grounds, be struck off the roll of another; and to support the application it would, it seems, suffice, merely to produce the rule of the other Court, ordering him to be struck off the roll (r).

This punishment of an attorney, by striking him off the roll, is not in all cases to be considered a perpetual disability; but the Judges may intend it as a temporary suspension only; and if his offence have been attended with circumstances of extenuation, and his subsequent

(k) *Mordecai v. Solomon*, Say. 172; see also *Addington v. Appington*, 2 Camp. 410; *Rex v. Fielding*, 2 Bur. 654; *De Rouffigny v. Peale*, 3 Taunt. 484.

(l) Tidd, 9th ed. 88; *Wadsworth v. Allen*, 1 Chit. Rep. 186.

(m) *Re Crossley*, 6 T. R. 701.

(n) MS. E. T. 1820.

(o) *Doe d. Thwaites v. Roe*, 3 D. & R. 226.

(p) *Ex p. Bramall*, 2 Cowp. 829; see also *Rex v. Vaughan*, 1 Wils. 22.

(q) *Ex p. Hill*, 2 W. Bl. 191.

(r) *Re Smith*, 1 B. & B. 522; 4 Moore, 319, S.C.; *Ex p. Hague*, 3 B. & B. 257; 7 Moore, 74, S.C.; *Ex p. Yates*, 9 Bing. 455.

conduct prove him deserving of their lenity, they may order him to be re-admitted, upon a proper application, by petition and motion, being made to them for that purpose (s). If he has been re-admitted in one Court, he will, it seems, be re-admitted in another, upon the mere production of the rule for his re-admission in the former Court (t).

*Striking off the roll at his own request, &c.]* An attorney may be struck off the roll at his own request; as, for the purpose of being called to the bar, or the like (u). The affidavit must state that there is no complaint pending against him, and that he does not apprehend any (x). He may afterwards be re-admitted, upon application to the Court, and undertaking not to take advantage of his privilege in any action then pending (y). If he has been called to the bar, however, it is doubtful if the Court would re-admit him; at least not until he have been disbarred, upon application for that purpose to the inn of Court where he was called (z). In general, he must satisfy the Court by affidavit that he ought to be restored (a).

#### 5. *Attornies, Delivery of Bill, Taxation of, and Remedy for Costs.*

*Delivery of bill.]* By the 3 Jac. 1, c. 7, s. 1, all attornies and solicitors must give a true bill unto their masters and clients, or their assigns, of all charges concerning the suits which they have for them in the superior Courts at Westminster, subscribed with their hands and names, before such time as they shall charge their clients with any such fees. Under this statute, therefore, a signed bill for business done in the superior Courts must always be delivered to the client before bringing an action for it (b); but not so for business done in other Courts (c). The statute extends to business done by one attorney for another, in a cause in which the latter was a party or personally concerned (d); but not to agency business (e).

Besides this act, it is enacted by 2 G. 2, c. 23, s. 23, that, one (lunar) month at least, before an attorney commences an action for the recovery of any "fees, charges, or disbursements," at law or in equity, he shall deliver a bill of the same to the party to be charged therewith, or leave it for him at his dwelling-house or last place of abode. Such bill must be written in English (excepting law terms and the names of writs); it must be written in words at length (excepting times and sums, and excepting such abbreviations also as are commonly used in the English language) (f), and in a common legible hand, and subscribed with the proper hand of such attorney (f).

(s) See *Rex v. Greenwood*, 1 W. Bl. 222, MS. 1830; *Ex p. Frost*, 1 Chit. Rep. 558, n.

(t) *Ex p. Yates*, 9 Bing. 454.

(u) See the form of the affidavit for that purpose, Chit. Forms, 16; and of the rule, *Id.*

(x) *Anon.* 1 Chit. Rep. 557, n., and see *Id.* 692, and MS. E. 1824.

(y) *Doug.* 114, n.; see also *Moody's* case, Barnes, 42; *Hill's* case, 2 W. Bl. 991.

(z) *Ex p. Cole*, 1 Doug. 114.

(a) *Ex p. Sambridge*, Tidd, 9 ed. 90;

*Ex p. Smith*, 1 Chit. Rep. 692.

(b) *Brooks v. Hayne*, 3 Salk. 19; *L. Raym.* 245, S. C.; *Milner v. Crowdall*, 1 Show. 338; *Clark v. Godfrey*, 1 Str. 633.

(c) *Reynal v. Smith*, 2 B. & A. 469; *Berkenhead v. Fanshawe*, 1 Salk. 86; 1 Show. 96; *Carth.* 147, S. C.

(d) *Hemming v. Wilton*, 4 C. & P. 318.

(e) *Sandys v. Hornby*, K. B. 1st Feb. 1831, MS.

(f) 12 Geo. 2, c. 13, s. 5; and see *post*, 47.

The words in this act, "fees, charges, and disbursements," are to be understood to mean for some business done in a *Court of justice*. A mere charge for attending and advising a party in a suit, though no actual business be done by the attorney, is within the act, and will require a bill to be delivered a month before action brought (g). Even the suing out of a writ of *dedimus potestatem*, to take the acknowledgment of a fine (h), the drawing an affidavit of debt, and getting it sworn (i), or preparing a warrant of attorney (k), is within the act, and a bill must be delivered a month before action brought. So must a bill containing a charge for attending defendant at a lock-up-house, and obtaining his release and filling up a bail bond (l). But charges in a bill for searching to see whether satisfaction of a judgment was entered, or whether an issue was entered and docketed, are not within the act (m). A bill for business done under an extent is, it seems, within the act (n): so is a bill for business done at the quarter sessions (o), or a bill for business done in a cause in a county court (p). But a bill for business done in the Middlesex court of requests is not (q); nor is a bill for business done in the House of Lords on the prosecution of an appeal (r); nor is a bill for business done in bankruptcy (s); nor is it requisite that such a bill should be taxed, under the stat. 6 G. 4, c. 16, s. 14, before the commencement of an action (t). A charge for attending upon and concerting measures with the attorney of the opposing creditor, to resist the discharge of an insolvent, is not within the act (u); though, indeed, the contrary has been held as to business done by an attorney of the superior Courts in the insolvent court, in procuring an insolvent's discharge (v). A bill for business done under a commission of lunacy is, it should seem, taxable before a master in Chancery (x).

A distinct claim for money lent is clearly not a "disbursement" within the act (y); nor is a claim for money paid by an attorney in consequence of his undertaking to pay the debt and costs (z). But a claim for 3*l.* lent to defendant to pay the costs of an action against defendant, and in which plaintiff was employed as his attorney, it seems, is (g); and so is any claim for money out of pocket expended by the attorney in the course of legal proceedings (a).

If there be no taxable item comprised in the attorney's demand,

(g) *Smith v. Taylor*, 7 Bingham 259, 1 Dowl. P. C. 212, S. C.; *Alderson, J.*, diss.

(h) *Exp. Prickett*, 1 New Rep. 266.

(i) *Winter v. Payne*, 6 T. R. 645.

(k) *Sandom v. Boissac*, 4 Camp. 68; *Weld v. Crawford*, 2 Stark. 538; *Wilson v. Gutteridge*, 3 B. & C. 157, 4 D. & R. 736, S. C.; *James v. Child*, 2 C. & J. 678.

(l) *Fearne v. Wilson*, 6 B. & C. 86, 9 D. & R. 157, S. C.

(m) *Fenton v. Correia*, 2 C. & P. 45, R. & M. C. N. P. 262, S. C.

(n) *Rex v. Collingridge*, 3 Price, 280.

(o) *Sylvester v. Webster*, 9 Bingham 388, 1 Dowl. P. C. 708, S. C.; *Exp. Williams*, 4 T. R. 496; *Clarke v. Donovan*, 5 T. R. 694, 1 Esp. 137, S. C.

(p) *Walker v. Nicholson*, 1 N. & M. 353, 4 B. & Adol. 409, S. C.; in which it was held that the preparing a replevin bond was business done in the county

court.

(q) *Beck v. Wells*, 1 C. & M. 75.

(r) *Williams v. Odell*, 4 Price, 279.

(s) *Crowder v. Davis*, 3 Y. & J. 433; *Hamilton v. Pitt*, 7 Bingham 232, 4 M. & P. 878, 1 Dowl. P. C. 210, S. C.; *Burton v. Chatterton*, 3 B. & Ald. 496. These cases were decided before the 1 & 2 W. 4, c. 56.

(t) *Id.*; and see *Taylor v. M'Gaugan*, 4 C. & P. 96; *Arrousmith v. Barford*, 1 Stark. 278, n.

(u) *Crowder v. Davies*, 3 Y. & J. 433.

(v) *Smith v. Wattleworth*, 1 C. & P. 615, 4 B. & C. 364, 6 D. & R. 510, S. C.

(x) *Jones v. Bywater*, MS. E. T. 1832, Exchequer, 2 C. & J. 371, 1 Dowl. P. C. 557, S. C.

(y) *Hemmings v. Wilton*, 4 C. & P. 318.

(z) *Prothero v. Thomas*, 6 Taunt. 196, 2 Marsh. 539, S. C.

(a) *Per Bayley, B., Latham v. Hyde*, 1 C. & M. 128.

as if the whole bill be for conveyancing, or the like, a delivery of a bill is unnecessary (b). But if an attorney do any business, &c., for a client, of a nature to make his bill taxable, and other business, &c., as such attorney, not so taxable, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover for the non-taxable business, &c., but must, under the statute, deliver his whole bill a month before an action is brought (c). Where, however, an attorney has not delivered any bill to his client *before* action brought, he is entitled to recover for business done or money paid, &c., by him for his client's use, where such business or money paid, &c., *has no reference whatever to his business of an attorney*; although he has other claims for business, &c., which are taxable (d).

Where an action is brought by the attorney's executor or administrator, a previous delivery of the bill is not required (e); and an attorney may prove his bill under a fiat of bankruptcy (f), or be a petitioning creditor (g), without delivering a signed bill. It should seem, also, that if the defendant accept a bill of exchange, or give a guarantee or any other security for the payment of the bill of fees, the plaintiff may sue on the security without delivering such bill of fees before action; also, if the attorney wish to set off his demand in an action brought against him by his client, this case is not within the meaning of the statute. Still, however, the Court will require that he should deliver a bill of his demand to the plaintiff, a reasonable time previous to the trial, in order that the client may have an opportunity of having it taxed, but he is not limited in this respect to any particular time (h).

By stat. 12 G. 2, c. 13, s. 6, nothing in the above act (2 G. 2, c. 23, s. 23) shall extend to any bill of fees, charges, and disbursements, due from one attorney to another; but recourse must be had to such remedy for the recovery of the same, as might have been had previously to the making of the said act. Where one attorney, therefore, does business for another, either as agent or otherwise, it is not necessary, under this act, that he should deliver a bill one month previously to his commencing an action for his costs (i). And this has relation, not to the time when the business was done, but to the time when the action was brought; therefore, where an attorney did business for a client, and afterwards, and before action, the client was admitted an attorney, the Court held that it was not necessary to deliver a bill a month previously to the commencing the action, because both parties were attorneys when the action was brought (j). But an attorney's or agent's

(b) See *Hooper v. Till*, 1 Doug. 199; *Tidd*, 9th ed. 328.

(c) *Thwaites v. Mackerson*, 3 C. & P. 341, 1 M. & M. 199, S. C.; *James v. Child*, 2 C. & J. 678; *Wardle v. Nicholson*, 4 B. & Adol. 469, 1 N. & M. 355, per Lord Tenterden, C. J.; *Smith v. Taylor*, 7 Bing. 259; see the prior cases of *Hill v. Humphreys*, 2 B. & P. 343; *Winter v. Payne*, 6 T. R. 645; *Peake*, 102.

(d) *Mowbray v. Fleming*, 11 East, 265; *Wardle v. Nicholson*, 4 B. & Adol. 469, 1 N. & M. 355, S. C.

(e) *Andr. 276*; 1 Barnard. 433; *Barrett v. Moss*, 1 C. & P. 3.

(f) *Eicke v. Nokes*, 1 M. & M. 303, per Lord Tenterden, C. J.

(g) *Ex p. Prideaux*, 1 Glyn & J. 28.

(h) *Williams v. Frith*, 1 Doug. 199; *Bulman v. Birkett*, 1 Esp. 449; *Tidd*, 9th ed. 333, 334.

(i) *Bridges v. Francis*, Peake, 1, 2, n.; *Nelson v. Garforth*, 1 Esp. 221; *Hooper v. Till*, 1 Doug. 199, n.; *Ex p. Bearcroft*, 1d. 200, n.

(j) *Ford v. Maxwell*, 2 H. Bl. 589, 1 Esp. 420, S. C.

bill, in such a case, may be referred to the master for taxation, notwithstanding the above statute (*i*); the party applying, offering to pay the amount into Court, as was the practice in all cases of reference to the master for taxation at common law. We have already seen (*ante*, p. 44) that sometimes, under the 3 J. 1, c. 7, s. 1, an attorney must deliver his bill to another attorney before action brought.

We have seen (*ante*, p. 44), how the statutes require the bill to be written and subscribed. Any abbreviations used must be such as are usual and intelligible (*k*).

In making out the bill on this stat. of 2 G. 2, c. 23, it is not sufficient to charge the costs of an action brought by the attorney for his client at one sum in the aggregate, although the costs in that action had been taxed at that sum as between party and party (*l*); and it seems, in such a case, the plaintiff cannot recover the residue of his bill as to which the provisions in the statute have been complied with (*m*). Where the plaintiff, in his bill, charged the defendant with specific attendances on particular days, and besides that charged a further sum for several attendances, the judge at the trial directed the jury to deduct this latter sum from the amount of the bill (*n*). A mistake in the date of any of the items, not calculated to mislead, does not vitiate the bill; if the bill be such that it is capable of being taxed, it is sufficient (*o*).

Leaving the bill at the client's counting-house, is not a sufficient delivery of it within the meaning of this act (*p*); but it is sufficient to leave it at the *last known* place of abode of the client; and it will be no objection to this, that the client had changed his residence previously to the delivery of the bill, if that circumstance were not known at the time to the attorney (*q*). The bill must also be *left*; therefore, where the attorney merely shewed the bill to his client, the Court held that it was not sufficient to enable him to maintain an action on it, although the client, at the time it was shewn to him, expressed himself satisfied with the charges (*r*). If the clients be two or more persons in partnership, a delivery of the bill to one of them, or leaving it at his dwelling-house, will be sufficient; or even where two persons are not partners, but are liable for business done on their joint retainer, it is sufficient if the attorney deliver his bill to the party who has been intrusted with the management of the business (*s*). Where a party in an action having changed his attorney, the second attorney obtained a judge's order that the former attorney should deliver his bill; and which was accordingly delivered

(i) *Hooper v. Till*, 1 Doug. 199; see *Anon.* 1 Wils. 266; *Gregg's case*, 1 Salk. 39.

(k) *Reynolds v. Caswell*, 4 Taunt. 193. The abbreviations "declon., affit., confe., atty.," have been held good, *Frood v. Stillard*, 4 C. & P. 51.

(l) *Drew v. Clifford*, 2 C. & P. 69, R. & M. C. N. P. 280, S. C.

(m) *Reynolds v. Taplin*, 6 Dec. 1826, at Guildhall, cor. Abbott, C. J.; see *quære*, and see R. & M. C. N. P. 280.

(n) *Rownson v. Earle*, 4 C. & P. 44, per Lord Tenterden, C. J.

(o) *Williams v. Barber*, 4 Taunt. 806.

(p) *Hill v. Humphrys*, 3 Esp. 254, 2 B. & P. 343, S. C.

(q) *Wadson v. Smith*, 1 Stark. 324; and see Gow, C. N. P. 73, n.

(r) *Crowder v. Shee*, 1 Camp. 437; *Brooks v. Mason*, 1 H. Bl. 290.

(s) *Finchett v. How*, 2 Camp. 277; and see *Oxenham v. Lemon*, 2 D. & R. 461.

to the second attorney: the Court held that this was a sufficient delivery of the bill to "the party to be charged therewith," within the meaning of this statute (*t*). The delivery of a bill to the attorney of the party to be charged is deemed sufficient, if the party himself attend the taxation, or the bill be shewn to have come to his hands (*u*). It is not sufficient evidence of the delivery of a signed bill at the defendant's abode, that a signed bill was delivered at a particular place, not shewn to be his abode, and that he afterwards gave this to his attorney, who attended the taxation of costs (*x*). And the defendant's having signed an admission of the debt, to enable the attorney to prove it under a commission of bankrupt then subsisting against him, is no admission of the delivery of a signed bill; and does not dispense with the necessity of such proof, in an action subsequently brought against him for the same claim (*y*).

The month limited by the statute for the delivery of the bill is to be considered a lunar month (28 days) (*z*). It should seem the month begins on the day the bill is delivered; and therefore, if the bill be delivered on the 1st of June, the month expires on the 28th of the same month, and the action may be commenced on the 29th (*a*). Where an attorney commenced his action before the expiration of the month, the Court refused to stay the proceedings; because that fact might be pleaded or taken advantage of at the trial (*b*). And where the defendant was arrested for an attorney's fees, after a bill of costs was delivered to him without being signed, the Court refused to discharge him out of custody on entering a common appearance (*c*).

If you wish to compel an attorney to deliver his bill—*take out a Judge's summons (d) for that purpose, requiring him to attend before a Judge at the expiration of two days, (R. H. 2 W. 4, reg. 91), or more, after taking it out, and serve him with it. If there was any cause in Court in which the business was done, intitle the summons in it. If he do not attend, after waiting half an hour at the Judge's chambers, an order (e) on him to deliver it in a reasonable time will be made of course. Serve him with a copy of the order; and if he still refuse or neglect to deliver his bill, move to make the order a rule of Court; serve him personally (f) with a copy of the rule; make an affidavit of service, and of the non-delivery of the bill, and thereupon move for an attachment (g). You cannot, it seems, have a summons for delivery of the bill and taxing it together (h).*

*Taxation of bills.] After an attorney's bill has been delivered, any judge of either of the superior Courts, (1 W. 4, c. 70, s. 4), upon application of the party chargeable by such bill, or of any other in that*

(*t*) *Vincent v. Slaymaker*, 12 East, 372.

(*u*) *Gow*, C. N. P. 71.

(*x*) *Eicke v. Noakes*, 1 Moody & M. 303, per Lord Tenterden, C. J.

(*y*) *Id. ib.*

(*z*) *Hurd v. Leach*, 5 Esp. 168; *Crook v. McIntuish*, 1 Bingh. 167, 8 Moore, 265, S. C.

(*a*) See *Castle v. Burditt*, 3 T. R. 623; *Watson v. Pears*, 2 Camp. 294; *Lester*

*v. Garland*, 15 Ves. 247; *Pellew v. Wofford*, 9 B. & Cres. 135; *ante*, 58.

(*b*) *Harper v. Leech*, Barnes, 123.

(*c*) *Tomlinson v. Clark*, 4 Moore, 4.

(*d*) See a form, Chit. Forms, 12.

(*e*) See a form, Chit. Forms, 13.

(*f*) *Anon.* 2 Chit. Rep. 66.

(*g*) As to the proceeding by attachment, see *post*, Vol. 2, Book 4, Part 3.

(*h*) *Tidd*, 9th ed. 335.

behalf authorized, and upon submission of such party, &c. to pay the whole that upon taxation shall appear due to the attorney, may refer such bill to be taxed, although no action be depending touching the same; and if the attorney, having due notice, shall refuse to attend such taxation, the officer may proceed *ex parte*. (2 G. 2, c. 23, s. 23). Pending the reference, no action shall be brought. (*Id.*) (h). The Court has not, it seems, any common-law right, independently of this statute, to direct the taxation of an attorney's bill of costs not incurred in any suit (i). Upon the bill being taxed, the party shall forthwith pay to the attorney the whole that shall be found due; or, in default, be liable to an attachment, or other proceeding, at the election of the attorney. Or if upon such taxation it shall be found that the attorney has been overpaid, he shall forthwith pay to the party such sum as the officer shall certify to have been so overpaid; or, in default, be liable to an attachment, or other proceeding, at the election of the party. (2 G. 2, c. 23, s. 23).

In all cases, where an attorney would be obliged to deliver a bill, previously to his suing upon it, such bill, when delivered, may, if the client wish it, be referred to the master for taxation, under the above act. We have already (*ante*, 44—46) noticed such cases. Also a bill delivered by the executor or administrator of an attorney may be referred, as in other cases (k); although we have seen (*ante* 46) that such executor or administrator is not obliged to deliver a bill previously to his commencing an action. Also, where an attorney delivered one bill for costs, and another for conveyancing, the Court ordered both to be taxed (l). In an action on a bond conditioned to indemnify the plaintiff from the costs of a cause, and the breach was that the plaintiff had been obliged to pay these costs, and that the defendant had refused to repay him, the Court refused to refer these costs to the master for taxation; although they advised the plaintiff to have them taxed, in order to avoid a suit in equity (m). But where the objection to the reference was, that no item in the bill was for business done in this Court, the Court said, that an action having been brought in this Court on the bill, that alone was sufficient to warrant them in referring it to the master for taxation (n). Although some of the items in the bill may have no relation to the business of this Court, as if there be items for conveyancing, for parliamentary business, for fees paid to a proctor (o), for business done in a criminal court (p), charges for holding a court-leet (q), or the like, the master may nevertheless tax these items as well as the other parts of the bill (r). Where the bill is referred for taxation to the prothonotary of the C. P., he may

(h) See *Hewitt v. Bellott*, 2 B. & Ald. 745.

(i) *Dagley v. Kentish*, 2 B. & Adol. 411; *semble* overruling *Wilson v. Gutteridge*, 3 B. & Cress. 158; 4 D. & R. 736, S. C.; *Anon.* 2 Chit. Rep. 155; and see *Res v. Bach*, 9 Price, 349; *Tidd*, 9th ed. 327.

(k) *Weston v. Pool*, 2 Str. 1056; *Grogg's case*, 1 Salk. 89; *Penson v.*

*Johnson*, 4 Taunt. 724.

(l) *Say*, 233.

(m) 1 Barnard. 144.

(n) 2 Barnard. 182.

(o) *Hooper v. Till*, Doug. 199.

(p) *R. v. Partridge*, Tidd, 9th ed. 329.

(q) *Lusmore v. Lethbridge*, 1 D. & R. 511; 5 B. & Ald. 898, S. C.

(r) *Wilson v. Gutteridge*, 4 D. & R. 736; 3 B. & Cress. 157, S. C.



refer items for business done in this Court to be taxed by the master, and this Court has no jurisdiction to interfere with that taxation of the master, nor is the prothonotary bound by it (s).

Where an attorney has delivered his bill, if you wish to have it referred to the master for taxation—*take out a summons requiring him to attend for that purpose before a Judge at the expiration of two days or more after taking it out, and serve it two days before it is attendable.* (R. H. 2 W. 4, reg. 91). *If the attorney do not attend, after waiting half an hour, an order may be made of course(t); the party undertaking (u) thereby to pay what shall be found due upon the taxation. Get an appointment from the master on the order; and serve a copy of the order and appointment on the attorney.* One appointment suffices. (R. H. 2 W. 4, reg. 92). *Afterwards, at the time appointed, attend before the master, and he will tax the bill.* A special agreement between an attorney and his client, as to the amount of the charges of the former, is not binding on the master on taxation (x).

An attorney's bill may be taxed at any time before it is paid (y); unless an action have been brought on it, and a verdict obtained or writ of inquiry executed, by plaintiff(z). Even after verdict, in an action upon an attorney's bill, the Court have referred it to the master for taxation(a); but this is very unusual, for the delay of the defendant for more than a month, in objecting to the bill, is an admission that he thinks it to be reasonable. The bill cannot be taxed at the trial of an action upon it (b). After the bill has been settled and paid, and the payment has been long acquiesced under, the Courts will not refer it to be taxed as a matter of course (c). But under special circumstances, distinctly pointed out, as, if there be a very gross error, or if the business was never performed, or the charges were fraudulent, or very gross, the Court will refer it to be taxed (d). A client, however, may pay his attorney's bill, in order to prevent an action; and afterwards move the Court to have it taxed. And if it appear that the attorney has been overpaid, the Court will oblige him to refund the surplus(e). But where a bill, under such circumstances, was reduced by the master upon taxation: it was holden

(s) *Re Jones*, 1 Dowl. P. C. 424.

(t) Tidd, 9th ed. 335.

(u) See form of undertaking, &c. Chit. Forms, 13.

(x) *Drax v. Scroope*, 1 Dowl. P. C. 69, 2 B. & Adolph. 581, S. C., and cases there cited.

(y) Tidd, 9th ed. 332.

(z) *Clarke v. Taylor*, Barnes, 124.

(a) *MS. H. 1820; Doe d. Thwaites v. Roe*, 3 D. & R. 226; *Nuttall v. Marr*, 3 D. & R. 33; *Benton v. Bullard*, 4 Bing. 561; *Lee v. Wilson*, 2 Chit. Rep. 63. In this latter case, the Court granted the application, it being plainly shewn that some of the items would not be allowed on taxation: but upon the terms of the defendant's paying the costs of the application, the costs of

taxation, and the costs of the cause as between attorney and client.

(b) *Hooper v. Till*, 1 Doug. 199; *Anderson v. May*, 2 B. & P. 237, 3 Esp. 167, S. C.; *Hewitt v. Ferneley*, 7 Price, 234; *Lee v. Wilson*, 2 Chit. Rep. 65; *Hellings v. Gregory*, 1 C. & P. 627.

(c) *Sayer*, Costs, 323; *Hooper v. Till*, 1 Doug. 199; and see Tidd, 9 ed. 332; *Ex p. Shippden*, 6 D. & R. 339; *Wilkinson v. Foster*, 7 Moore, 496; *Johnes v. Lloyd*, 10 Price, 62; *Drax v. Scroope*, 2 B. & Adol. 581, 1 Dowl. P. C. 69, S. C.; *Glascoott v. Castle*, 1 Dowl. P. C. 317, 2 C. & P. 355, S. C.

(d) Id.

(e) 2 G. 2, c. 23, s. 23, *ante* 49, M. S. E. 1814; and see *Williams v. Frith*, 1 Doug. 198; *Hooper v. Till*, Id. 199.

that the client could not recover the surplus by action; but his remedy must be by application to the Court (*f*). Where a party, after having paid certain costs, brought an action against another upon an indemnity which he had given him against these costs; the Court refused to refer the costs to the master for taxation; although they advised the plaintiff to have them taxed, in order to avoid a suit in equity (*g*).

*Costs of taxation.*] If the bill, when taxed, be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation; but if not less by a sixth part, the Court, at discretion, may charge the attorney or client with such costs, according to the reasonableness or unreasonableness of the bill. (2 *G. 2*, c. 23, s. 23; *R. H. 2 W. 4*, reg. 11.). This act, compelling the attorney to pay the costs of taxation, in the event of a sixth part being taken off the bill, is imperative, and it is not in the discretion of the Court to relieve him therefrom (*h*). Where, however, the attorney has delivered a bill a month before he brings an action, and the client waits until the action be brought without taxing the bill, he is not entitled to the costs of such taxation made after action brought, although more than a sixth be taken off (*i*); and, in one case, even when more than a sixth was deducted, but the deduction arose, not from the taxation of particular items, but by a whole branch of the bill being disallowed, the Court ordered the client to pay the costs of taxation (*k*). Nor will the Court order the executor or administrator of an attorney, in any case, to pay such costs, even where more than a sixth part has been deducted by the master, or even in a case where the bill had been delivered by the attorney himself in his lifetime (*l*). Where less than a sixth is disallowed by the master, the Court almost uniformly oblige the client to pay the costs of taxation (*m*). Whether a sixth be deducted or not, the costs of taxation can be obtained only by application to the Court or a Judge, unless the parties consent that they may be included in the master's allocatur. In the Common Pleas, where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time, and cannot recover them by motion after making a subsequent settlement (*n*).

*Attorney's remedy for costs.*] If the bill have not been taxed, the

(*f*) *Gower v. Popkin*, 2 Stark. 85; *Marsh v. Munn*, MSS. K. B. 27 Nov. 1832.

(*g*) 1 Barnard. 144, and *ante*, 49.

(*h*) *Higgins v. Woolecott*, 5 B. & Cres. 760, 8 D. & R. 589, *nom.* *Dickens v. Woolecott*, S. C.

(*i*) *Harbin v. Miles*, 9 B. & Cres. 755; *Coates v. Nash*, Id. 757, n.; *Benton v. Bulard*, 4 Bingh. 561; *Jay v. Coaks*, 8 B. & Cres. 635, 3 M. & R. 35, S. C.

(*k*) *White v. Milner*, 2 H. Bl. 357.

(*l*) *Weston v. Pool*, 2 Str. 1056.

(*m*) *Hurst v. Dixon*, Barnes, 118; *Barker v. Bishop of London*, Id. 14, n; *Hindle v. Shackleton*, 1 Taunt. 536. In *Elwood v. Pearce*, 8 Bingh. 83, 1 M. & Scott, 159, 1 Dowl. P. C. 251, S. C. the Court of C. P. would not allow the attorney the costs of taxation of his bill, where nearly one sixth part was disallowed.

(*n*) *Whitfield v. James*, 1 Bingh. 207, 8 Meere, 40, S. C.

attorney's remedy for his costs is by action of assumpsit or debt; if taxed, he has the option of proceeding by action or attachment. In the action, the plaintiff is required only to give general evidence of the business being done, to prove his retainer either directly or from circumstances (o), and that a bill signed was delivered in due time (p). That the charges are reasonable, is considered admitted, by the defendant's not having had the bill taxed (q). It is sufficient to give in evidence a Judge's order to tax the bill, the defendants undertaking to pay what shall appear to be due and the master's allocatur thereon (r). The Nisi Prius record is good *prima facie* evidence to shew that the action was not commenced till the expiration of a month after the delivery of the bill (s). Where the record *prima facie* shews it was commenced earlier than that time, then the plaintiff should prove the issuing of the writ, either by an examined copy of it if returned, or by production of the writ itself. The declaration delivered by the plaintiff is admissible in evidence on the part of the defendant, to prove that the action was commenced earlier than it appears to have been by the Nisi Prius record (t). The delivery of a bill is conclusive evidence against an increase of charge, in a subsequent bill, on any of the items contained in it; and presumptive evidence against any additional items (u). The bill may be proved by a copy, without giving notice to produce the original (x). No proof of plaintiff's actually being an attorney, or of his having taken out the annual certificate is required (y). Proof of his being retained as such suffices (z). The disproof lies on the defendant (a).

In an action on an attorney's bill, the defendant cannot set up any damage received from the negligence or ignorance of the attorney, as a defence (b); unless where the negligence or ignorance has had the effect of rendering the proceeding sought to be charged for, wholly ineffective (c). And in a late case it was, it seems, considered that the defendant might set up as a defence, that the plaintiff had not exercised reasonable diligence and skill, whereby plaintiff incurred the cost sought to be recovered (d). If the object were unjustifiable delay, the attorney's neglect to pursue it, is, it seems, not a defence (e). The defendant may set up as a defence, and prove, that the plaintiff agreed to be paid in gross for prosecuting the action in respect of which the

(o) As to these proofs, see 1 Saund. on Pl. & Evid. 157; Rosc. on Evid. 196; 1 Phil. on Evid.

(p) As to such proofs, see Id. and ante, 50.

(q) Peake, Ev. 262—264; Anderson v. May, 2 B. & P. 237; Williams v. Frith, 1 Doug. 198.

(r) Lee v. Jones, 2 Camp. 496.

(s) Webb v. Pritchett, 1 B. & P. 263.

(t) 2 Camp. 496, n.

(u) Loveridge v. Botham, 1 B. & P. 49.

(x) Colling v. Treweek, 6 B. & Cres. 394; Anderson v. May, 3 Esp. 167, 2 B. & P. 237; Philipson v. Chace, 2 Camp. 110.

(y) Berryman v. Wise, 4 T. R. 367.

(z) Pearce v. Whale, 5 B. & Cres. 38. 7 D. & Ry. 512, S. C.; Sparling v. Haddon, C. P. Westm. 29 May, 1832.

(a) See Id.

(b) Templer v. M'Lachlan, 2 New Rep. 136; Johnson v. Alston, 1 Camp. 176; Dae v. Ward, 1 Stark. C. N. P. 409; Passmore v. Birnie, 2 Stark. 59.

(c) Id. Hill v. Featherstonehaugh, 7 Bing. 569; Shaw v. Arden, 9 Bing. 287.

(d) Montrou v. Jefferys, R. & M. C. N. P. 452; and see Hopkinson v. Smith, 7 Moore, 237; 1 Bingh. 13, S. C.; Taylor v. Glassbrook, 3 Stark. 75.

(e) Johnson v. Alston, 1 Camp. 175.

charges which plaintiff seeks to recover were incurred (*f*); or that the plaintiff agreed to charge only the money out of pocket, which he has paid him (*g*); or that the plaintiff agreed to charge nothing; and evidence, that, when the attorney's agent went before the master to have the bill taxed, he admitted such was the case, will suffice (*h*).

It may be here observed, that the Court will not allow an attorney to take or act upon a warrant of attorney or mortgage for costs to be incurred (*i*).

*Attorney's lien for costs.*] An attorney has a lien for his costs, upon all deeds and papers in his hands belonging to his client; and the Court will not order them to be delivered up, until he is paid or otherwise satisfied. (*ante*, p. 30) (*j*). And if a bill of exchange be given to him for his costs, he might, perhaps, retain his client's deeds, &c. until such bill should be paid; at least the lien continues if the bill be afterwards dishonoured (*k*). He has also a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill (*l*). And an agent for an attorney dying intestate and insolvent pending a suit wherein he was plaintiff, has a lien for his costs upon a postea, of which the agent has obtained possession after the death of the intestate (*m*). But where a person gave deeds to another for the purpose of satisfying himself as to their sufficiency to secure an annuity he agreed to grant him, and the other gave them to a third person for the purpose of investigating the title, but the treaty for the annuity afterwards went off for some reason not connected with any objection to the title; it was holden that the third person could not retain the deeds for his costs of investigating the title, for he was not employed by the party to whom the deeds belonged (*n*). And it has even been held, that where an attorney prepares a deed, and that deed is afterwards executed, he cannot, after execution, retain the deed for his costs of preparing it (*o*).

If money belonging to the client come to the attorney's hands, he may retain so much of it as will satisfy his bill for costs (*p*). He has also a lien for his costs upon money recovered by his client (*q*),

(*f*) Com. Dig. Champerty, B. 14; Hob. 117; Tidd, 9 ed. 325; *Thwaites v. Macpherson*, 3 C. & P. 341, 1 M. & M. 199, S. C.; *Stanley v. Stanley*, 7 Bing. 369; but see *Williams v. Protheroe*, 5 Bingh. 309; 3 Y. & J. 129, S. C.; *Williamson v. Henley*, 6 Bingh. 299; *Gillet v. Rippon*, 1 M. & M. 406.

(*g*) *Parker v. Harcourt*, 5 Esp. 249.

(*h*) *Ashford v. Price*, 3 Stark. 185.

(*i*) *Jones v. Hunter*, 1 Dowl. P. C. 462; *Jones v. Tripp*, Jac. 322.

(*j*) As to a solicitor's lien in equity, see 2 Sch. & Lef. 279, 13 Ves. 161, 18 Ves. 282.

(*k*) *Stevenson v. Blakelock*, 1 M. & S. 535; and see *Esdaile v. Oxenham*, 3 B.

& Cres. 225; *Oxenham v. Esdaile*, 2 Y. & J. 493.

(*l*) *Lambert v. Buckmaster*, 4 D. & R. 125; 2 B. & Cres. 616, S. C.; and see *Noble v. Kersey*, 4 C. & P. 90.

(*m*) *Taunton v. Goforth*, 6 D. & Ry. 384.

(*n*) *Holls v. Claridge*, 4 Taunt. 807. and see *Re Sharpe*, 1 Dowl. P. C. 432.

(*o*) *Anon.* 1 L. Raym. 734; *sed vide Green v. Farmer*, 4 Burr. 2218; *Cotterel v. Hooke*, 1 Doug. 100.

(*p*) *Welsh v. Hole*, 1 Doug. 238.

(*q*) *Middleton v. Hill*, 1 M. & S. 240; *Glaister v. Hewitt*, 8 T. R. 69; *Randle v. Fuller*, 6 Id. 456; *Mitchell v. Oldfield*, 4 Id. 123; *Welsh v. Hole*, 1 Doug. 293.

or awarded to him (r), in a cause in which the attorney was employed; and this, even although the client had previously become a bankrupt (s). Or he may stop it *in transitu*, by giving notice to the opposite party not to pay it until his claim for costs be satisfied, and then moving the Court to have the amount of his costs paid to him in the first instance (t); and if, notwithstanding such notice, the other party pay the money to the client, he is still liable to the attorney for the amount of his lien (u), and the attorney in such a case shall not be prejudiced by any collusive release given by his client (x). But, unless such notice be given, the client may, if done *bona fide*, compromise with the other party, and give him a release, without the intervention of his attorney; and the attorney in such a case can afterwards look to his client only for payment (y). Therefore, where a plaintiff, pending the action, compromises it with the defendant, without consulting his attorney, the attorney cannot proceed in the action to recover his costs (z); unless there have been some collusion or fraudulent conspiracy between the parties to cheat the plaintiff's attorney of his costs (a); or unless the action be for purely unliquidated damages (b). And where the plaintiff, after judgment, employed a new attorney\* to enter satisfaction on the roll, the Court, upon application, discharged the defendant out of custody, although the attorney's lien was not satisfied; for they held that they had no power to detain the defendant in custody, after satisfaction had been entered on the roll (c). Where a plaintiff, after charging the defendant in execution, died, and the defendant's wife took out administration to him, the Court held that the plaintiff's attorney had no longer any lien on the judgment for his costs, and ordered the defendant to be discharged out of custody (d). As to the lien of agents, *see ante*, p. 28.

If two parties obtain judgments, the one against the other, and one of them applies to the Court to have his judgment set off against the judgment of the other, the Court will permit him to do so only upon the terms of his satisfying the lien which the attorney of the opposite party has upon the judgment for his costs in that particular suit (e).

(r) *Ormerod v. Tate*, 1 East, 464; and see *Irving v. Viana*, 2 Y. & J. 70.

(s) *Griffin v. Eyles*, 1 H. Bl. 122.

(t) *Welsh v. Hole*, 1 Doug. 238.

(u) *Read v. Dupper*, 6 T. R. 361.

(x) *Ormerod v. Tate*, 1 East, 464; *Gould v. Davis*, 1 Dowl. P. C. 288, 1 C. & J. 415, 1 Tyr. 380, S. C.

(y) *Welsh v. Hole*, 1 Doug. 238; *Chapman v. Haw*, 1 Taunt. 341.

(z) *Charlwood v. Berridge*, 1 Esp. 345; *Graves v. Eades*, 5 Taunt. 429; 1 Marsh. 113, S. C.; *Rooke v. Wasp*, 5 Bing. 190; 2 Moore & P. 304, S. C.; *Nelson v. Wilson*, 6 Bing. 508; but see *Toms v. Powell*, 6 Esp. 40; 7 East, 536, 3 Smith, 554, S. C.; *Cole v. Bennett*, 6 Price, 15.

(a) *Swain v. Senate*, 2 New Rep. 99; *Graves v. Eades*, 1 Marsh. 113; *Nelson v. Wilson*, 6 Binn. 518; see *Martin v.*

*Francis*, 2 B. & Ald. 402; 1 Chit. Rep. 241, S. C.

(b) *Ex p. Hart*, 1 B. & Adol. 660, 1 Dowl. P. C. 324, S. C.

(c) MS. E. 1821, *Mare v. Smith*, 4 B. & Ald. 466; and see *Abbott v. Rice*, 3 Bing. 152; 10 Moore, 489, S. C.

(d) *Pyne v. Erle*, 8 T. R. 407.

(e) See R. H. 2 W. 4, r. 93; *Mitchell v. Oldfield*, 4 T. R. 123; *Morland v. Hammersley*, 2 H. Bl. 441, n; *Middleton v. Hill*, 1 M. & S. 240; *Randle v. Fuller*, 6 T. R. 456; *Vansandau v. Burt*, 1 D. & R. 168; *Harrison v. Bainbridge*, 2 B. & Cres. 800; 4 D. & R. 363, S. C.; 5 D. & R. 399; 3 B. & Cres. 535, S. C. See the different practice which prevails in C. P. *Brydges v. Smith*, 1 Dowl. P. C. 242, 8 Bingh. 29, 1 M. & Scott, 93, S. C.

And the same, where the rights of the parties arise from separate awards (*f*). But if the rights of the parties arise in the same action, or from the same award, as if a defendant obtain a rule for costs for not proceeding to trial, and the plaintiff afterwards have a verdict in the same cause (*g*); or if, by an award, one party be ordered to pay the costs of a nonsuit to the other, and the latter to pay a gross sum to the former (*h*), the Court will allow one sum to be set off against the other, without satisfying the attornies for the amount of their costs; for the lien of an attorney in such a case is only upon the balance which is ultimately to be paid to the one or other party. And, in general, interlocutory costs may be set off against final costs, where the payment of them at the time they were adjudged is not, strictly speaking, a condition precedent to ulterior proceedings (*i*). But where a defendant was, by a Judge's order, allowed to go to trial upon certain terms upon payment to the plaintiff of a certain sum of money, and the costs incurred up to the date of the order, and the plaintiff consented to the trial proceeding on those terms before the costs had been paid; it was held, that the defendant, having obtained a verdict, was bound to pay those costs, and could not set them off against those afterwards taxed for him on the postea (*k*).

(*f*) MS. E. T. 1814.

(*g*) R. H. 2 W. 4, r. 93; *Howell v. Harding*, 8 East, 362; *Doe d. Dangerfield v. Allsopp*, 9 B. & Cres. 761.

(*h*) *Figes v. Adams*, 4 Taunt. 632.

(*i*) *Doe v. Carter*, 8 Bing. 330, 1 Dowl. P. C. 269, S. C.

(*k*) *Aspinall v. Stamp*, B. & Cres. 108; 4 D. & R. 716, S. C. The distinction between this case and that in 9 B. & Cres. 761, *supra*. n. (*g*), is, that in this case the plaintiff's costs sought to be set off had not been incurred at the time when the order was made.

## CHAPTER III.

## TERMS AND RETURNS, ROUTINE OF BUSINESS OF THE COURT, &amp;c.

*The Terms.*] There are four terms in each year: Hilary, Easter, Trinity, and Michaelmas. Previous to the passing of the 1 *W. 4*, sess. 1, c. 70, Hilary and Michaelmas terms were called *fixed* terms, because they invariably began on certain fixed days in the year; Easter and Trinity were called *moveable* terms, because their commencement was regulated by moveable feasts, namely, Easter-day and Trinity Sunday. But now the commencement and duration of all of these terms are fixed by the late acts of 1 *W. 4*, sess. 1, c. 70, s. 6, and 1 *W. 4*, sess. 2, c. 3. By the first of these enactments, Hilary term begins on the 11th and ends on the 31st January; Easter term begins on the 15th April and ends on the 8th May; Trinity term begins on the 22nd May and ends on the 12th June; and Michaelmas term begins on the 2nd and ends on the 25th November; but if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day fall within Easter term, there are to be no sittings in *banc* on any of such intervening days; and the commencement of the ensuing Trinity term is in such case to be postponed, and its continuance prolonged for an equal number of days of business. The other enactment provides that if the day on which any term *ends* be a Sunday, then the Monday following shall be the last day of the term; and that if any of the days between the Thursday before and the Wednesday next after Easter shall fall within Easter term, then such days shall be a part of such term, although there be no sittings in *banc* on any of such intervening days. Neither of the above statutes say on what day the term shall *begin*, in case the day fixed for its commencement be a *Sunday*; in such case, however, the day so fixed must, for the purpose of computation, be considered as the first day of the term, although, as the Courts do not sit, no judicial act can be done or supposed to be done till the following Monday (a).

Formerly, the first general return day of the term (which was called the *essoign* day) was the day on which the Court sat to receive *essoigns*; but when *essoigns* were no longer allowed to be cast in personal actions, the Court discontinued sitting on that day (b). Still such *essoign* day was, until the 1 *W. 4*, c. 70, s. 6, for many pur-

(a) This was decided by the Court in several cases in T. T. 1831; and see Tidd's Supp. 220, n.

(b) *Argent v. Dean of St. Paul's*, 16 East, 7.

poses considered as the first day of the term (c). Thus judgments (which were considered in law as having relation to the first day in term) related to the essoign day in actions by original (d). But that statute has, it seems, done away with the essoign day for all purposes as part of the term (e).

*Return days, &c. of writs.*] Since the 2 W. 4, c. 39, writs for the commencement of personal actions, viz, *writs of summons, capias, and detainer*, do not specifically mention any return day whatever, the return being regulated by the service or execution of the writ; and if the writ be served or executed on any day, whether in term or vacation, all proceedings to judgment and execution may be had thereon at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation; provided, however, that if the last of such eight days happen to fall on a Sunday, Christmas-day, or on any public fast or thanksgiving day, (as to which see *ante*), then the following day is to be considered as the last of such eight days; and if the last of such eight days happen to fall on any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day is to be considered as the last of such eight days. (2 W. 4, c. 39, s. 11). The writ of *distringas* to enforce the defendant's appearance on a writ of summons, also a writ of *exigent proclamation*, and other writs subsequent to the writ of *capias* or *distringas* in proceedings to *outlawry* must be made returnable in term on a day certain; and all other writs, not above mentioned, are returnable in term on a day certain, with the exception of those in an ejectment founded on a supposed original, or in replevin, or other suit received from an inferior court by an original writ of *pone, recordari facias loquelam*, or *accedas ad curiam*, which are returnable on a general return day.

The first general return day for every term is the fourth day before the day of the commencement of the term, both days being included in the computation. If that day be a Sunday, then the first general return day is the Monday following. This first general return day of the term is called the *Essoign day* of the term, because the Court formerly on that day sat to receive essoigns; but essoigns (as we have just seen, *ante*, 56) are no longer allowed to be cast in personal actions (f).

The day after the essoign day is called the *day of Exception*; because on that day the plaintiff might enter his exception and obtain a *ne recipiatur*, to prevent the defendant's essoign from being received. On the third day, the sheriff formerly returned his writs into court, and they were then delivered into the custody of the *Cus*

(c) *Belk v. Broadbent*, 3 T. R. 185.

(d) *Whittaker v. Whittaker*, 8 B. & Cres. 768; *Harry v. Broad*, 2 Salk. 628; and see *Samuel v. Evans*, 2 T. R. 576; *Greenway v. Fisher*, 7 B. & Cres. 436; 1 M. & Ry. 330, S. C.; *Eyles v. War-*

*ren*, 4 M. & S. 174.

(e) *Price v. Hughes*, 1 Dowl. P. C. 448.

(f) *Argent v. Dean of St. Paul's*, 16 East, 7, 8, n.



*tos Brevium*; the third day was therefore called the *Retorna Brevium* day. The sheriff, however, now returns his writs at once into the office of the *Custos Brevium*. The fourth day, or *quarto die post*, called the Appearance day, or *Dies amoris*, was the day given, by the favour and indulgence of the court, to the defendant for his appearance; and on this day the parties appeared in court, and had their appearance recorded by the proper officer.

There were also three other general return days in the term upon which some writs must have been made returnable: but now, by the 1 W. 4, sess. 2, c. 3, s. 2, all writs usually returnable on *general* return days may be made returnable on the third day exclusive before the commencement of the term, or on *any day*, not being *Sunday*, between that day and the *third day exclusive*, before the last day of the term: and the day for appearance is as heretofore, viz. the third day after such return, exclusive of the day of the return; or in case such third day falls on a Sunday, then on the fourth day after such return, exclusive of such return day.

*Computation of time.*] The number of days allowed by the practice of the court for appearing, pleading, &c., was in general (when not otherwise expressed) reckoned *exclusively* in actions by bill in the King's Bench, and *inclusively* in actions by *original* in that court, or in the Common Pleas. But by a late general rule R. H. 2 W. 4, reg. VIII., it is ordered that "in all cases in which any particular number of days, not expressed to be *clear days*, is prescribed by the rules or practice of the Courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas day*, *Good Friday*, or a day appointed for a *public fast or thanksgiving*, (as to which, see *ante*, 7, 8); in which case the time shall be reckoned *exclusively* of that day also.

Besides this rule, the doctrine in computing the time from an act done has lately been to *exclude* the first day, at least when the act was not done to the party himself, so that he might not therefore know of it immediately (*g*). If plaintiff be discharged from an illegal imprisonment on the 14th of December, and he must wait a month before commencing his action for it, the commencement of his action on 14th of January would be in time (*h*). If a month's notice of action be requisite, the month begins on the day the notice is served; and therefore, if notice be served on 28th April, it expires on 27th May and the action may be commenced on 28th May (*i*).

*The sittings in Banc and in Bail Court.*] The Court now sits every day in full term, excepting Sundays, and the days between the Thursday next before and the Wednesday next after Easter day, or any of them when they fall in term. Before the alteration of the terms by 1 W. 4, c. 70, s. 6 (*ante*, 56), the courts never sat on the feast of

(*g*) *Lester v. Garland*, 15 Ves. 248;  
*Pellon v. Inh. Wymford*, 9 B. & Cres.  
134; *Hardy v. Ryle*, *Id.* 603.

(*h*) *Hardy v. Ryle*, 9 B. & C. 603.  
(*i*) *Castle v. Burdett*, 3 T. R. 623;  
*Watson v. Pears*, 2 Camp. 294.

the Purification, Ascension day, or Midsummer day. But if Midsummer day happened on Friday next after Trinity Sunday, which was the first day in full term, it was *dies juridicus*, by stat. 32 H. 8, c. 21; and they now sit on all these days. The days between the Thursday next before and the Wednesday next after Easter day, or any of them, when they fall in Easter term are not to be reckoned or included in any *rules* or *notices*, or other *proceedings*, except notices of trial and notices of inquiry. (*R. E. 2 W. 4*). But writs may be made returnable on them (*k*).

The Court sits in *banc* every morning at ten o'clock, during the term only. The vacations are devoted to the sittings at *Nisi Prius* and the circuits. By stat. 3 G. 4, c. 102, the Court were enabled to sit in *banc* in vacation, for the despatch of such business as might be pending at the end of each term, upon a warrant under the sign manual being directed to them for that purpose. But that statute is now repealed by the 1 W. 4, sess. 1, c. 70, s. 6, except so far as it repeals the former act of 1 & 2 G. 4, c. 16. The Puisne Judges sit by rotation in each term, or otherwise, as they agree amongst themselves, so that no greater number than three of them sit at the same time in *banc* for the transaction of business in term, unless in the absence of the Lord Chief Justice. (1 W. 4, c. 70, s. 1).

One of the Judges, while the others are sitting in *banc*, usually sits apart from them in the *Bail Court*, at half-past nine every morning, for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the court. (*Id.*) But this business may still be transacted by the Court sitting in *banc*; generally, however, all simple matters of practice are decided by the single Judge in this Court. In cases of difficulty, indeed, if the Judge entertain any doubt as to the propriety of granting a rule, he refers the application to the Court sitting in *banc*, or grants a rule *nisi*, against which cause is shewn before such Court. The *common paper* is disposed of in this Bail Court, and a separate *peremptory paper* of all motions relating to practice is made out and cleared in the same manner as in the Court sitting in *banc*. Mondays and Thursdays are the days on which insolvent debtors, under the compulsory clauses in the Lord's Act, are disposed of.

There are certain days in each term, called *paper days*, because the Court, on those days, hear the causes which have been entered in the paper for argument, before they enter upon motions. Tuesdays and Fridays are paper days on the civil side; Wednesdays and Saturdays on the crown side. No cause, however, can be set down in the paper for argument on the first paper day of the term, nor on the last day of the term; nor can any (*see R. M. 38 G. 3*) excepting common demurrers and the like where no argument is expected, be set down for any of the three days preceding the last day of term. The causes set down in the paper for argument must be argued in the order in which they stand entered; and they shall not be adjourned to any future day, by consent or otherwise, unless the Court for reasonable

(*k*) *Lilly v. Gompertz*, 1 Dowl. P. C. 472, 1 Dowl. P. C. 506, S. C. 376; *Hall v. Welshman*, 2 Crom. & J.

cause, verified by affidavit, and upon application, at least two days before the day of argument, shall otherwise order; and all such causes remaining undetermined at the end of any term, shall, without any new entry, be continued in the books kept by the clerk of the papers, to come on in the next term, in the order in which they stand. (*R. M. 30 G. 2, r. 2*).

All rules enlarged till the following term are set down in what is termed the *peremptory paper* (*l*); eight for the first day of the term, and for every following day, until the whole shall be disposed of. (*R. M. 17 G. 3; H. 6 G. 3*). A list of them shall, after every term, be fixed up in the offices both on the crown and civil side, specifying the particular days on which the respective motions are to come on; and a copy of such lists shall be delivered to each of the Judges the day before the beginning of term. (*R. H. 6 G. 3*). The rules thus entered in the peremptory paper shall be heard on the respective days for which they are made peremptory, unless special grounds, by affidavit or otherwise, be shewn to the Court for postponing them; (*R. H. 36 G. 3*); and they shall not be enlarged during the term, or put off from the appointed day, by the consent of counsel or attorneys, without leave of the Court. (*R. E. 41 G. 3*).

Mondays and Thursdays, not being *paper days*, are usually occupied in *motions*, and in any other business which the Court may have appointed for those days,

The counsel have pre-audience in motions in the order of their precedence; those within the bar first, as the attorney general, the solicitor general, the king's serjeants, the king's counsel, &c.; then the serjeants and barristers without the bar, beginning from the centre to the left, and then from the centre to the right, of each row, until all the counsel in court shall have moved. This is usually termed "going through the bar." The motion then recommences with the attorney general, and then goes through the bar in the same order, as long as it is convenient for the Court to sit. It is usual to call upon the bar to make one round of undisputed motions before any are made requiring argument. Upon *paper days* the Court proceed to hear the causes entered in the paper argued in their order; and afterwards, if they have time, will hear motions. Upon Mondays and Thursdays, they first go through the bar, then proceed to any other business which may have been appointed for those days, and lastly, again hear motions until the Court rises.

Upon the *last day* in term counsel cannot move for an attachment except for non-payment of costs on the master's *allocatur* (*m*), or against the sheriff for not returning the writ or bringing in the body (*n*), nor move that a party may answer the matters of an affidavit (*o*), or for the master's report after the examination of a party upon interrogatories, unless with the leave of the Court, or under some very special circumstances (*p*); nor can he shew cause against

(*l*) There are now two peremptory papers, one for rules relating to practice, and other matters which may be disposed of by the single Judge sitting in the bail court; and the other for such special rules as require the decision

of the four Judges sitting in banc. Chap. Pract. 78.

(*m*) 5 Bur. 2686.

(*n*) 1 Bur. 651, n.

(*o*) *Jacob's case*, 4 Bur. 2502.

(*p*) *Rex v. Wheeler*, 1 W. Bl. 311.

a rule for setting aside an award; (*R. M. 36 G. 3*); nor will any rule *nisi* obtained on that day operate as a stay of proceedings.

*Sittings at Nisi Prius in and after term.*] Once every week during term, and for several days after term, one of the judges (usually the chief justice, but sometimes one of the puisne judges), sits at *Nisi Prius*, at Westminster, and at the Guildhall, London, to try causes, in which the jury process has been directed to the sheriffs or other returning officers of Middlesex and London respectively.

Until lately, only one judge could sit at *Nisi Prius*, either in Middlesex or London; but now, by 1 G. 4, c. 55, s. 2, the chief justice or other judge of the court, and also such one of the puisne judges as the chief justice may appoint, may sit at *Nisi Prius*, in separate courts, at the same time, for the trial of causes in Middlesex or London; and the marshal and other officers of *Nisi Prius* shall appoint persons, approved of by the chief justice, to act for them in such additional *Nisi Prius* court. And now, by 1 W. 4, c. 70, s. 4, any one of the judges of the superior courts at Westminster, to whatever court he may belong, is authorized to sit in London and Middlesex for the trial of issues arising in any of such courts.

By the 1 G. 4, c. 55, s. 1, the sittings *after term* might be continued during the entire vacation. But now, by the 1 W. 4, c. 70, s. 7, not more than *twenty-four* days (exclusive of Sundays) after Hilary, Trinity, and Michaelmas terms, nor more than *six days* (exclusive of Sundays) after Easter term, to be reckoned consecutively immediately after such terms, shall be appropriated to sittings in London and Middlesex for the trial of issues of *fact*; provided, however, that if a *trial at bar* be directed by the Courts, the judges may appoint such day or days for the trial as they think fit; and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term; provided also, that a day or days may be specially appointed, at any time not being *within* such twenty-four days, for the trial of any cause at *Nisi Prius*, with the *consent* of the parties thereto, their counsel or attorneys.

Formerly, the sittings for Middlesex must have been in Westminster Hall; but they may now, with the consent of his Majesty, under his sign manual, be holden at any place in the city of Westminster the chief justice may deem convenient for the purpose; (1 G. 4, c. 21, s. 1); and the trials in such places may, in all records, process, indictments for perjury, &c. be alleged and laid to have been had in Westminster Hall. (*Id.* s. 2). However, this act, and the 3 G. 4, c. 87, as to the Exchequer, though continuing in force, were only acted upon whilst the Courts at Westminster Hall were rebuilding.

*The Circuits.*] In the vacations after Hilary and Trinity terms, the judges of the three superior Courts at Westminster make their *circuits*, and try at *Nisi Prius*, in each county which they visit, those causes in which the jury process has been directed to the sheriff or other returning officer of such county. The records in all these

causes (with the exception of such as are to be tried in counties palatine) are made up in the superior Courts at Westminster. The *Nisi Prius* records are taken down by the parties to the county where the venue is laid, or to which the jury process has issued, there to be tried before these justices; after which they are returned to the attornies of the prevailing parties, with the *postea* indorsed on them, for the purpose of having the judgment signed, and of carrying that judgment into execution. In counties palatine, the records of the causes to be tried there are sometimes made up in the superior Courts at Westminster, sometimes in the courts of such counties palatine.

The judges, upon circuits, are empowered by stat. 1 G. 4, c. 55, ss. 5, 6, to grant summonses and make orders, upon circuit, in causes depending in any of the Courts at Westminster, in which the issues, if brought to trial, would be tried upon their circuits respectively, in the same manner as if they were judges of the Court in which such causes are so depending.

*Attendance at Chambers.*] Besides their attendance in court, the puisne judges also attend, in turn, for the space of a term, at the *chambers* in Serjeants' Inn, every day during term, from 3 o'clock until 5, and every morning in vacation (when they are not engaged on circuit) from 11 o'clock till 1. Their clerks attend from 11 o'clock until 2, and from 6 till 8, every day during term and the sittings and in vacation from 11 till 1. The chief justice usually attends chambers during the absence of the other judges on circuit. The course of proceedings at these chambers will be noticed *post*, Vol. 2, Book 4, Part 1, Chap. 34.

## BOOK I.

### PROCEEDINGS PREVIOUS AND SUBSEQUENT TO A TRIAL BY JURY ON THE MERITS.

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## PART I.

### PROCEEDINGS IN BAILABLE ACTIONS.

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## CHAPTER I.

### PROCEEDINGS FROM THE COMMENCEMENT OF THE ACTION, UNTIL THE DEFENDANT BE FULLY BEFORE THE COURT.

BEFORE commencing an action against a party, the practitioner should carefully ascertain whether there be a legal cause of action; and if there be, then who should be the plaintiff and who the defendant in the action.

If the plaintiff intends arresting the defendant, the *first* proceeding in the cause which the practitioner has to consider is the *affidavit of debt*; but before preparing it, he should ascertain whether the proposed defendant be or be not privileged from arrest; and then whether the cause of action be such for which he may be arrested; and if he be not so privileged, and the cause of action affords grounds for the arrest, then let him prepare the affidavit, and get it sworn accordingly, as hereafter fully noticed. If the defendant be so privileged from arrest, or the cause of action be such that he could not be arrested for it, or the affidavit be defective, then the defendant, if arrested, may get discharged out of custody. The law and practice on these subjects will be found in the FIRST section of this chapter.

The affidavit of debt being sworn, the *second* proceeding to be considered is the *process*, by which you may arrest the proposed defendant. The nature and form of such process, and mode of issuing, will form the subject of the SECOND section of this chapter.

These two proceedings having been adopted, the *third* proceeding to be considered is the *arrest* itself; the mode of effecting which will form the subject of the THIRD section.

After a defendant has been arrested, he is either *discharged*, upon giving a bail bond to the sheriff, or upon giving security to the plain-

tiff for his appearance, or upon depositing with the sheriff the sum sworn and a sum to answer the costs, or without any bail or security, or he escapes, or is rescued, or is lodged in the prison of the county, &c. These several subjects will be considered in the **FOURTH** section.

The next proceeding to be considered, in order to bring the defendant before the Court, is the *proceeding against the sheriff*, by ruling him to return the writ, and to bring in the body, which if he fail to do, an attachment may be issued against him. These proceedings will form the subject of the **FIFTH** section.

If the defendant, having given a bail bond to answer for his appearance (*i. e.* to put in and perfect bail above), as required by the writ, fail to do so, you (the practitioner on the plaintiff's part) are next to consider whether you will not, as you may generally do, take an assignment of *the bail bond*, and *proceed on it* against the defendant and his sureties who joined with him in it. The proceedings on this bond, as well by the plaintiff in the action when he has taken an assignment of it, as by the sheriff himself when the plaintiff has not so taken it, will be treated of in the **SIXTH** section.

If proceedings be adopted by the plaintiff, either against the sheriff or upon the bail bond, you (acting for the sheriff, or the sureties in the bond, or the defendant,) are to consider whether they may not be *set aside* for some irregularity, or upon payment of costs, &c. if they be regular. The law and practice on this subject will be found in the **SEVENTH** section.

Next must be considered the defendant's appearance to the writ; or, in other words, the putting in and perfecting *special bail*, (or, as it is sometimes called, *bail above*), or paying money into Court in lieu of it. This will be found treated of in the **EIGHTH** and last section of this chapter.

Upon these proceedings being adopted, the plaintiff proceeds in the action by *declaring*, &c.; which proceedings will form the subject of the second and subsequent chapters of this Book.

## SECT. 1.

### *Affidavit to hold to Bail.*

1. *Who may or may not be holden to Bail*, 65 to 78.
2. *In what Actions*, 78 to 82.
3. *The Affidavit*, 82 to 93.
4. *In what Cases the Court will discharge the Defendant, and Consequences of Defect, &c.* ~~the~~ *Affidavit*, &c., 93, 94.

### 1. *Who may or may not be holden to Bail.*

WHERE the cause of action is such as to admit of an arrest as the mode of bringing the defendant before the Court, he may generally be holden to bail. There are some cases, however, where the defendant, by reason of the dignity of his station, or of other circum-

stances, is privileged from arrest; and these necessarily form exceptions to the rule above mentioned. The cases in which this privilege is enjoyed shall be considered under the following heads. The cases in which a party has a mere *temporary* privilege from arrest will be treated of in the third section of this chapter, while considering the arrest itself.

*The royal family, &c.*] The royal family cannot be holden to bail (a). Also the servants in ordinary or menial servants of the king, or of a queen regnant, cannot be arrested (b), even although they be in trade (c). A candle and fire lighter to the yeomen of the guard at St. James's Palace is privileged (d); but this privilege does not extend to the servants of a queen consort, queen dowager, &c. (e); nor to a gentleman of the king's privy chamber (f); nor to the fort major, or deputy governor of the Tower of London (g), nor, as it seems, to the wardens of the Tower (h).

*Peers.*] Peers of the realm of England are privileged from arrest, both upon mesne process and in execution (i); but it seems a peer by patent, if sued by his Christian and surname and not by his title of nobility, cannot claim this privilege, if he have never sat in parliament (j). Peeresses are also entitled to the same privilege, whether they are peeresses by birth, by creation, or by marriage (k); but if a peeress by marriage afterwards marry a commoner, she thereby loses all her privileges, as well as her title of nobility (l).

This privilege from arrest is extended to Scotch peers and peeresses by stat. 5 A. c. 8, art. 23, whether such peers have been chosen to sit in parliament or not (m); and to Irish peers and peeresses, by stat. 39 & 40 G. 3, c. 67, art. 4 (n). If arrested, the court will discharge them on motion, the privilege, especially in the case of an Irish peer, being *primâ facie* made out (o); and the Court, on such motion, will not go into the defendant's right to his title; being a peer *de facto*, and having acted as such, or voted at the election of Scotch peers, will suffice to entitle him to his discharge (p). In general,

(a) 2 Inst. 50.

(b) 2 Keb. 3, 485; T. Raym. 152; *Hartlett v. Hebbes*, 5 T. R. 606; and see *R. v. Stobbs*, 3 T. R. 735.

(c) *King v. Foster*, 2 Taunt. 167.

(d) *Hatton v. Hopkins*, 6 M. & S. 271.

(e) 1 Keb. 842, 877.

(f) *Luntley v. Battine*, 2 B. & Ald. 234; *Tapley v. Battine*, 1 D. & R. 79.

(g) *Butson v. McLean*, 2 Chlt. Rep. 48; *Sard v. Forrest*, 1 B. & Cres. 169; 2 D. & R. 250, S. C.

(h) *Bidgood v. Davies*, 6 B. & Cres. 84; 9 D. & Ry. 153, S. C.; see *Bell v. Jacobs*, 1 M. & P. 309; 4 Bingh. 523, S. C.; Tidd, 9th ed. 190.

(i) 6 Co. 52; 9 Co. 49 a, 68 a; *Hobart*, 61; 2 H. Bl. 272; *Couche v. Lord*

*Arundel*, 3 East, 127.

(j) *Lord Banbury's case*, 2 L. Raym. 1247; 2 Salk. 512, S. C.

(k) 6 Co. 52; *Huntingdon's case*, 1 Vent. 298; see *Style*, 252, *contra*.

(l) Co. Lit. 16, b.

(m) *Fortescue*, 165.

(n) *Coates v. Lord Hawarden*, 7 B. & Cres. 388; 1 M. & Ry. 110, S. C.

(o) *Storey v. Birmingham*, 3 D. & R. 488. In *Davies v. Lord Rendlesham*, 1 Moore, 410; 7 Taunt. 679, S. C., where an Irish peer was sued by bill, the Court of Common Pleas refused to set aside the proceedings, but left him to plead his privilege.

(p) *Digby v. Lord Stirling*, a Scotch peer, 8 Bing. 55; 1 M. & Scott, 116; 1 Dowl. P. C. 248, S. C.



the Court will not put the party to the necessity of entering an appearance (*g*). It seems the sheriff would not be a trespasser in making the arrest (*r*).

The servants of peers also were formerly privileged from arrest; but this was abolished by stat. 10 G. 3, c. 50, s. 10 (*s*).

*Members of the house of commons.*] Members of the house of commons are privileged from arrest during the session of parliament, and for a convenient time before and after it. It is said that the privilege *eundo et redeundo* continues for 40 days (*t*); which seems, however, to have been doubted (*u*). The house of commons, indeed, have always avoided deciding the limits of their privilege in this respect; and the question as to the extent of it can be determined by them only. In 1586, when Mr. Martin, a member, was arrested twenty days before the meeting of parliament, the house ordered him to be discharged; but when the question was put whether they should limit a time for the continuance of this privilege, the proposition was negatived (*x*). It is clear, however, that the members enjoy this privilege after a dissolution, as well as after a prorogation (*y*).

If a member be arrested during the period of privilege, the Court will discharge him on motion, and will not oblige him to sue out a writ of privilege (*z*); he must, however, produce the return of his writ of election (*a*), affidavits of that fact not being deemed sufficient (*b*).

Members of convocation seem also to enjoy the same privilege, in this respect, as members of the house of commons (*c*).

*Ambassadors and their servants.*] Ambassadors and other public ministers of foreign princes or states, at this court, and their "domestics and domestic servants," are privileged from arrest; and all process, &c., against them for that purpose is void. (7 A. c. 12, s. 3). If a person thus privileged be arrested, the Court, upon motion, will order him to be discharged without entering an appearance; or if he have given a bail bond, the Court will order it to be given up to be cancelled (*d*). This statute, however, does not extend to consuls or their servants (*e*); nor to such of the domestic servants of an ambassador, &c. as are subject to the bankrupt laws (*f*); nor to persons holding situations inconsistent with the office of such a domestic (*g*); nor to any person colourably only, and not *bona fide*, in the service of

(*q*) *Holday v. Pitt*, 2 Str. 990.

(*r*) *Tarleton v. Fisher*, Dougl. 671.

(*s*) See *Connelly v. Smith*, 1 Chit. Rep. 83.

(*t*) 2 Lev. 72; 1 Brownl. 91.

(*u*) 1 Sid. 29.

(*x*) *Scobell*, 109, 110.

(*y*) *Holday v. Pitt*, 2 Str. 995; Fortesc. 159; 2 Comyns, 444, S. C.

(*z*) *Id.*

(*a*) *Id.* and *Fenwick v. Fenwick*, 2 W. Bl. 788.

(*b*) See also *Dyer*, 59 b, 60 a.

(*c*) 8 H. 6, c. 1; 1 Eq. Ca. Abr. 349.

(*d*) *Cross v. Talbot*, 8 Mod. 288.

(*e*) *Fiveash v. Becker*, 3 M. & S. 284.

(*f*) 7 A. c. 12, s. 5; and see Rep. Pract. C. B. 65, 134; *Toms v. Hammond*, Barnes, 370; *Cain v. Molins*, *Id.* 374; *Triquet v. Bath*, 1 W. Bl. 471; 3 Bur. 1478, S. C.; *Id.* 1731.

(*g*) *Masters v. Manby*, 1 Bur. 401; *Darling v. Atkins*, 3 Wils. 33.

such ambassador (*h*); nor to a courier or messenger, for he is not a domestic (*i*). But it is not necessary that the servant should reside in the ambassador's house (*j*), provided he do the duties of his office there (*k*); and it seems that a chorister, *bond fide* employed by an ambassador in the performance of religious worship in his chapel, is thus privileged under the above statute (*l*); nor is it material whether the servant be a foreigner or a native of this country (*m*).

The plaintiff, attorney, officer, and others concerned in suing out process against such public ministers or their servants, shall, upon a summary conviction (*n*) before the court appointed for that purpose by the statute, suffer such pains, penalties, and corporal punishment, as to such court shall seem meet. (7 A. c. 12, s. 4). Provided that no officer, &c. shall be so punished, unless the name of such servant have been registered at the office of the secretary of state, and from thence transmitted to the office of the sheriffs of London and Middlesex. (*Id.* s. 5) (*o*). But although the name of such person be regularly registered as the act directs, yet if he be not in the *bond fide* and actual service of the ambassador, and such as the statute otherwise protects, he may be holden to bail, and the sheriff is bound to execute the process against him (*p*).

If the sheriff refuse to execute process against a defendant, who claims this privilege, but who is not *bond fide* an ambassador's servant, and such as is protected by the statute, the plaintiff may maintain an action against him, or rule him to return the writ; and in either case the question of the defendant's title to the privilege he claims will be brought fully before the Court.

If a servant of an ambassador be arrested, he should move the Court to be discharged out of custody, or that the bail bond (if he have given one) may be delivered up to be cancelled. The affidavit in support of such an application should state that the defendant is a *domestic* servant of such ambassador (*q*), and that he was such at the time of the arrest (*r*); it should also state the capacity in which he was hired (*s*), and that he performed the duties of such office (*t*); and it should also negative his being a trader within the meaning of the bankrupt laws. It would not suffice for him merely to state that his name was registered at the office of the secretary of state, and from thence transmitted to the sheriff's office (*u*).

*Aliens.*] Aliens are not in general privileged from arrest. Formerly, indeed, by several statutes (38 G. 3, c. 50, s. 9; 41 G. 3, c. 106;

(*h*) *Malachi Carolina's case*, 1 Wils. 78; 3 Burr. 1676; *Flint v. De Loyant*, Tidd, 9th ed. 191.

(*i*) *Deserisay v. O'Brien*, Barnes, 375.

(*j*) *Widmore v. Alvares*, Fitzg. 200; *Evans v. Higgs*, 2 Str. 797, 2 L. Raym. 1524, S.C.; see *Novello v. Toogood*, 1 B. & Cres. 554, 2 D. & R. 833, S.C.

(*k*) *Semb. Id.*

(*l*) *Fisher v. Begrez*, 1 Crom. & M. 117.

(*m*) *Lockwood v. Cosgarne*, 3 Bur. 1676.

(*n*) See *Triquet v. Bath*, 3 Bur. 1480.

(*o*) See *Heathfield v. Chilton*, 4 Bur. 217; *Hopkins v. Roebuck*, 3 T. R. 79.

(*p*) *Seacomb v. Bownley*, 1 Wils. 20; *Devallo v. Plomer*, 3 Camp. 47.

(*q*) *Toms v. Hammond*, Barnes, 370; *English v. Caballero*, 3 D. & R. 25.

(*r*) *Heathfield v. Chilton*, 4 Bur. 2015.

(*s*) *Hardw. 3*; *Widmore v. Alvares*, Fitzg. 200.

(*t*) *Seacomb v. Bownley*, 1 Wils. 20; *Malachi Carolina's case*, *Id.* 78; *Triquet v. Bath*, 3 Bur. 1478, 1731; *Poitier v. Croza*, 1 W. Bl. 48; *Crosse v. Talbot*, 8 Mod. 288; 1 Barnard. 79, 80, 401.

(*u*) *Fisher v. Begrez*, 1 Crom. & M. 117.

and 43 G. 3, c. 155, s. 28), aliens who had fled to this country on account of the revolution or troubles in France, or in any country conquered by the arms of France, were prohibited from being holden to bail, or taken in execution, for any debt or other cause of action contracted or arising in parts beyond the seas other than the dominions of his majesty, whilst such aliens were not within the said dominions; and if any alien was arrested contrary thereto, he was to be discharged upon application to the Court, or to a judge in vacation (v). These statutes, however, have been suffered to expire. One foreigner may arrest another in this country for a debt which accrued in a foreign country while both resided there, though the law of the foreign country does not allow of arrest for debt (x). In an action, however, between parties, on a contract made between them in a foreign country, the contract is to be interpreted according to the foreign law, although the remedy must be taken according to the law here (y).

*The Judges, Serjeants, Barristers, &c.*] The judges and serjeants of the superior Courts cannot, it seems, be holden to bail; but barristers may, unless they be going to attend, or be attending, or be returning from attending, a cause or proceeding in Court. In one case, a barrister was discharged from arrest on the circuit (z). The sheriff cannot, it seems, take notice of their privilege (a).

*Attornies and officers of the Court.*] The attornies and other officers of the court cannot be holden to bail (b); even where it appeared that a defendant, an attorney, was about to quit the kingdom, the Court refused to order special bail (c). But an attorney who has left off practice (d), or who has not taken out his certificate (e), or who is already in custody for debt (f), is not entitled to this privilege; and therefore it has been ruled that an attorney, who had not practised for several years, might be arrested, though, after suing out the writ and before the arrest, he recommenced his practice and took out his certificate (g). An attorney's certificate having been, by his agent's mistake, filed in the Court of King's Bench, in which Court he had not been admitted, instead of the Court of Common Pleas, and he being sued for a debt in an inferior court, sued out a writ of privilege, the Court ordered it to be quashed, and a *procedendo* issued (h). An attorney, however, does not lose his privilege, in this respect, by not taking out his certificate, unless he have omitted to take it out for

(v) See *Sinclair v. Phillips*, 2 B. & P. 363.

(x) *De la Vega v. Vianna*, 1 B. & Adol. 284, overruling *Melan v. Duke de Fitz James*, 1 B. & P. 138. See also *Imlay v. Ellefsen*, 2 East, 455, *post*, 71, 76.

(y) 1 B. & Adol. 284.

(z) *Hippesley's case*, 1 H. Bla. 636.

(a) See *Co. Lit.* 131; 1 Salk. 1; *Tariton v. Pleher*, Dougl. 671; *Cameron v. Lightfoot*, 2 W. Bla. 1190; *Walters v. Rees*, 4 Moore, 36.

(b) See *Brown's case*, 2 Salk. 544.

(c) *Redman's case*, 1 Mod. 16.

(d) *Goldsmith v. Bayard*, 2 Wils. 232; *Goodwin v. Gibbons*, 4 Bur. 2109; *Dyson v. Birch*, 1 B. & P. 4; *Broke v. Bryant*, 7 T. R. 25; *Anon.* 1 Dowl. P. C. 208, in which it was held that a single instance of practice was not sufficient to entitle him to his privilege.

(e) *Broke v. Bryant*, 7 T. R. 25.

(f) *Byles v. Wilton*, 4 B. & Ald. 88.

(g) *Broke v. Bryant*, 7 T. R. 25; *Id.* 26.

(h) *Nison v. Hewitt*, 10 Moore, 270.

one whole year (i). An attorney is entitled to this privilege in a *quidam* action, as well as in other actions (k); but not where the action is wholly at the king's suit (l). Also if an action be brought against him jointly with a person not privileged (m), he is not entitled to his privilege (n).

If an attorney of this court be arrested by virtue of process issuing hence, the Court will, on motion, or a Judge in vacation, upon motion on summons, order him to be discharged, (in general, however, without costs), on entering an appearance (o); but if he be sued in another court, or the attorney of another court be sued in this, and arrested, he must put in bail, sue out his writ of privilege from the court in which he is an attorney, and plead it in abatement (p). And in a late case, where an attorney of this court has been arrested on process issuing out of the Common Pleas, it was held, that this Court could not relieve him summarily (q). And in neither case is the sheriff obliged to take notice of his privilege, or discharge him, even upon the production of his writ of privilege (r); unless the arrest have been made under process of an inferior court, in which case the writ of privilege should be allowed *instanter* (s).

When a writ of privilege is necessary, *engross it on plain parchment* (t). *Get a certificate from the master's clerk that the defendant is an attorney of the court; and leave it with the signer of the writs, at the time he signs the writ. Pay nothing for signing; 7d. sealing. If the defendant be arrested by process of an inferior court, carry the writ to the clerk of the papers, or secondary of the inferior court, and he will allow it, and grant a supersedeas. Serve the supersedeas upon the officer who has arrested the defendant, and he must instantly discharge him. Or if the defendant merely apprehend that bailable process will issue against him from an inferior court, he may sue out his writ of privilege, and have it allowed as above directed, which will stay the issue of any process against him from that court; and for the defendant's greater security he may obtain a certificate of the allowance from the secondary or officer of the inferior court, which will protect him from arrest, should process happen to issue against him.*

*Parties to a suit, witnesses, &c.]* Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, attorneys, &c., are

(i) See 5 M. & S. 281, and *ante*, 24.

(k) *Britten v. Teasdale*, Barnes, 48.

(l) 2 Ro. Abr. 274.

(m) *Branthwaite v. Blackerby*, 2 Salk. 544; Dy. 277; 2 Ro. Abr. 274. See *Ramsbottom v. Harcourt*, 4 M. & S. 585.

(n) See further Vol. 2, Book 3, Chap. 3.

(o) *Wheeler's case*, 1 Wils. 298; *Nichols v. Earl*, 8 T. R. 395; *Barber v. Palmer*, 6 T. R. 524; *Pearson v. Henson*, 4 D. & R. 73.

(p) *Snee v. Humphrey*, 1 Wils. 306; *Brown's case*, 2 Salk. 544; *Mayor of Basingstoke v. Bonner*, 2 Str. 864; 2 L. Raym. 1567, S. C.

(q) *Ex p. Whitehead*, MS. M. T. 1830, 1 Dowl. P. C. 3.

(r) *Crossley v. Shaw*, 2 W. Bl. 1085; *Forster v. Cole*, 1 Str. 76; *Comarford v. Price*, Doug. 314; Rep. Pr. C. B. 2; *Duncomb v. Church*, 1 Salk. 1.

(s) Rep. Pr. C. B. 2; *Crossley v. Shaw*, 2 W. Bl. 1087.

(t) See the form, Chit. Forms, 14.

privileged from arrest whilst going to, attending, and returning from court. This privilege will be more fully considered in section 2 of this chapter.

*Bail.*] In actions on bail bonds, replevin bonds, and recognizances of bail, the defendant cannot be holden to bail (*u*); even where an action on a bail bond was brought against the defendant in the original action, the Court discharged him on entering an appearance (*x*). But if the plaintiff obtain judgment in an action on such bond or recognizance, he may hold the defendants to bail in an action on the judgment (*y*).

*Bankrupts.*] The temporary privilege of a bankrupt from arrest during his examination will be hereafter considered. If the bankrupt obtain his certificate, and be afterwards arrested for any debt proveable under his commission, upon application to a Judge at chambers, or to the Court, he will be discharged out of custody, on entering an appearance (*z*); unless it appear that the certificate has been obtained by fraud (*a*), or that there are other good grounds for disputing its validity (*b*), in which case the Court will not interfere, but will leave the defendant to plead his bankruptcy and certificate (*c*). And where the bankrupt was taken under an attachment for not performing an award, the Court refused to discharge him, without giving the other party time to shew that the certificate was fraudulently obtained (*d*). So also where judgment was entered up in Trinity term, and execution issued in Michaelmas term; on the 13th Nov. in that term, the bankrupts obtained their certificate, and on the same day the sheriff's officer levied, and the debt and costs were paid into court under a Judge's order, to abide the event of a motion; the Court refused to interfere by ordering the money to be paid out of court, but left the parties to their *audita querela* (*e*). But where the certificate was obtained after issue and before judgment, and the bankrupt was then rendered by his bail, he was held entitled to his discharge in a summary way, although he had not pleaded his certificate *puis darrien Continuance* (*f*). In a late case, it was held that an attorney in custody, under an attachment for non-payment of money, pursuant to a rule of court, is entitled to be discharged from custody, on having become bankrupt and obtained his certificate, even though he received the money in the course of his employment as attorney (*g*). Where

(*u*) *Brandon v. Robson*, 6 T. R. 336; *Ormond v. Brierley*, 1 Salk. 90.

(*z*) *Mellish v. Petherick*, 8 T. R. 450.

(*y*) *Prendergast v. Davis*, Id. 85.

(*c*) 6 G. 4, c. 16, ss. 120, 121. As to what debts are proveable, see Arch. B. L. 70, 105, 208. The goods as well as the person of the bankrupt are protected by the certificate.

(*a*) *Sowley v. Jones*, 2 W. Bl. 725; *Martin v. O'Hara*, Cowp. 823; *Vincent v. Brady*, 2 H. Bl. 1.

(*b*) *Stacey v. Federici*, 2 B. & P. 390.

(*c*) *Combes v. Blackhall*, 1 Stra. 477; *Heaves v. Mott*, 6 Taunt. 329; *Graham v. Benton*, 1 Wils. 41.

(*d*) *Nowers v. Colman*, Buck, 5.

(*e*) *Harrison v. Blakey*, 1 M. & P. 261; and see *Ex p. Cullingford*, 8 Barn. & Cres. 290.

(*f*) *Humphreys v. Knight*, 6 Bing. 572.

(*g*) *Re v. Edwards*, 9 Barn. & Cres. 652.

the debt was contracted in England, and the bankruptcy and certificate in Ireland, or in a foreign country, the Court will not discharge the defendant (*h*); nor will they, it seems, discharge him, although the debt were contracted in a foreign country, whilst both parties were resident there, and the defendant there became bankrupt, and obtained his certificate (*i*). Even if a bankrupt, after obtaining his certificate, subsequently promise, in writing or otherwise, to pay a former debt, it seems the Court, if he be arrested upon such promise, will discharge him on entering an appearance (*k*).

*Insolvent debtors.*] A debtor discharged under an insolvent act cannot be holden to bail for any debt from which he may have thus been legally discharged. This privilege is always guaranteed to him in express terms by the insolvent acts (*l*). And where a defendant is arrested for a debt in respect of which he has been discharged under the insolvent acts, and given a bail bond, the Court will order the bail bond to be delivered up to be cancelled, whether the defendant be in actual custody or not (*m*). Even if an insolvent debtor, after being discharged under an insolvent act, subsequently promise to pay a former debt, the Court, if he be arrested upon such promise, will discharge him on entering an appearance (*n*); and this, though the promise be by a bill of exchange or note, which is in the hands of the plaintiff, a *bond fide* indorsee (*o*).

Although certificated bankrupts, or persons discharged under insolvent acts, are privileged from arrest, yet the sheriff or his officer is not liable to an action of false imprisonment for arresting them (*p*).

*Baron and feme.*] If a married woman be arrested upon mesne process, the Court will in general discharge her on entering an appearance, or order the bail bond, if any, to be given up to be cancelled, whether she be arrested with or without her husband (*q*); or upon process against her and her husband jointly, or against her alone (*r*);

(*h*) *Quin v. Keefe*, 2 H. Bl. 553; *Dixon v. Baldwin*, 5 East, 177; *Pedder v. McMaster*, 8 T. R. 609; *Philpotts v. Reed*, 1 B. & B. 13, 3 Moore, 244, S.C.

(*i*) See *De la Vega v. Vienna*, 1 B. & Adol. 284; *Maule v. Murray*, 7 T. R. 470; *Imlay v. Ellefson*, 2 East, 453. But there would be a defence to the action, see *Potter v. Brown*, 5 East, 124; and as to a *cassio honorum*, see *Phillips v. Allan*, 8 B. & Cres. 477, 2 M. & R. 576, S.C.

(*k*) *Bailey v. Dillon*, 2 Bur. 736; *Perris v. Gadderer*, 1 B. & Cres. 116, 2 D. & R. 240, S.C.; *Wilson v. Kemp*, 3 M. & S. 595.

(*l*) 7 G. 4, c. 57, ss. 46, 55, 60. See *Edwards v. Tucker*, 4 D. & R. 216; *Sammon v. Miller*, 9 B. & Cres. 770.

(*m*) *Norton v. Moseley*, 9 D. & R. 107, 6 B. & Cres. 106, S. C.; see *vide Done v. Smith*, 3 D. & R. 600.

(*n*) *Wilson v. Kemp*, 3 M. & S. 595; *Butt v. Vine*, 4 D. & R. 154; see *vide Horton v. Moggeridge*, 6 Taunt. 563.

(*o*) *Kay v. Masters*, 1 Dowl. P. C. 86.

(*p*) *Turlton v. Fisher*, 2 Doug. 671; *Sherwood v. Benson*, 4 Taunt. 631.

(*q*) *Crooks v. Fry*, 1 B. & Ald. 165; *Taylor v. Whitaker*, 2 D. & R. 225; *Edwards v. Rourke*, 1 T. R. 486; *Pritchett v. Cross*, 2 H. Bl. 17; *Cro. Jac.* 445; 1 Lev. 216. But see *Roberts v. Mason*, 1 Taunt. 254; *Jones v. Lewis*, 7 Id. 55.

(*r*) *Edwards v. Rourke*, 1 T. R. 486; *Cro. Jac.* 455; 1 Lev. 216; *Waters v. Smith*, 6 T. R. 451; *Pitt v. Thompson*,

and this, although her husband constantly reside abroad (*s*); or although she and her husband live apart under articles of separation, and he allow her a separate maintenance (*t*); or even although, at the time she obtained the credit, she appeared and acted as a *feme sole*, if she did not deceitfully represent herself as such in order to obtain the credit (*u*); or if, by mistake, she alleged her belief that her husband was dead (*x*); or if the plaintiff, at the time of giving the credit, knew her to be a married woman (*y*). But if she have knowingly and deceitfully imposed herself on the plaintiff as a *feme sole*, for the purpose of obtaining credit (*z*), or if she have given a bill of exchange as a *feme sole* (*a*), or if the fact of coverture be doubtful (*b*), the Court will not interfere in this summary manner to relieve her, but will leave her to her plea of coverture, in the ordinary course of proceeding.

If the process be against the husband and wife, he alone should be arrested; and he shall not be discharged until he put in bail for both (*c*). There is some difference between the practice of this Court and that of the Common Pleas upon this subject (*d*).

It may be as well here to notice, that it is the practice to discharge the wife when taken in *execution* as well as on *mesne* process. But if interlocutory judgment has been obtained against a woman when *sole*, after which she marries, final judgment may be entered up, and execution taken out against her when married (*e*). And a married woman, taken in execution with her husband, for a debt due from her before marriage, is not entitled to be discharged, unless it appear that she has no separate property; even although the husband has been discharged under the insolvent act (*f*).

The application for the discharge of the married woman should be made before judgment, or, at all events, before writ of inquiry executed, otherwise she would be left to her writ of error (*g*).

The affidavit in support of the application must state positively that she is married, and to whom; and not state it by way of inference or argument, as, for instance, that she is married, "as by the certificate hereunto annexed will appear," or the like (*h*); and the

1 East, 16; *Haly v. Morgan & Wife*, MSS. Exch. 25 Nov. 1831, though the cause of action arose before marriage.

(s) 1 East, 17, n. See *De Guillon v. L'Aigle*, 1 B. & P. 8.

(t) *Marshall v. Rutton*, 8 T. R. 545; *Wardell v. Gooch*, 7 East, 582; and see *Hookham v. Chambers*, 3 B. & B. 92.

(u) *Collins v. Rowed*, 1 New Rep. 54.

(x) *Pitt v. Thompson*, 1 East, 16.

(y) *Waters v. Smith*, 6 T. R. 451; *Wardell v. Gooch*, 7 East, 582; *Wilson v. Serres*, 3 Taunt. 307; *Slater v. Mills*, 5 M. & P. 603, 7 Bing. 606, S. C.

(z) *Partridge v. Clarke*, 5 T. R. 194; *Fream v. Mitford*, 1 C. & M. 54; and see *Luden v. Justice*, 1 Bing. 344, 8 Moore, 346, S. C.; *Hall v. Barber*, 1

Dowl. P. C. 8; *Simon v. Winnington*, Id. 16.

(a) *Jones v. Lewis*, 7 Taunt. 55.

(b) *Partridge v. Clarke*, 5 T. R. 194; *Pearson v. Meulon*, 2 W. Bl. 903.

(c) 1 Vent. 49; *Anon.* 1 Mod. 8; *Roberts v. Andrews*, 1 W. Bl. 720, 3 Wils. 124, S. C.; *Crooks v. Fry*, 1 B. & Ald. 165.

(d) See *Roberts v. Mason*, 1 Taunt. 254; *Tidd*, 9th ed. 194.

(e) See *Cooper v. Hunchin*, 4 East, 521.

(f) *Sparkes v. Bell*, 8 B. & Cres. 1, 2 M. & R. 124, S. C.

(g) *Moses v. Richardson*, 8 B. & Cres. 421.

(h) *Hurvey v. Cooke*, 5 B. & Ald. 747.

Court of Common Pleas require the woman herself in all cases to swear to the coverture (k).

The Court do not, in general, make the plaintiff pay the costs of the application, unless, perhaps, where he knew of the coverture at the time of the arrest (l). Nor even then, if the married woman has been guilty of any deception or fraud on him (m). Nor will the Court in general order the married woman to pay the plaintiff's costs of the application (n).

*Corporators and hundredors.*] Members of a corporation aggregate cannot be holden to bail for any thing done by them in their corporate capacity (o). Also hundredors cannot be holden to bail in actions against them on the statute of 7 & 8 G. 4, c. 31 (p).

*Executors, administrators, and heirs.*] Executors, administrators, and heirs, cannot in general be holden to bail, in actions against them for the debts of the deceased; because the action in such a case is not so properly against them personally, as against the effects of the deceased in their possession (q). But if they give a sufficient promise in writing to pay such debts, they thereby make their own property liable for the payment of them, and they may consequently be holden to bail thereon (r); or if an executor or administrator be guilty of a *devastavit*, he may afterwards be holden to bail in an action by a creditor upon a judgment, suggesting such *devastavit* (s); for he thereby has rendered his effects liable for the debt, and may be sued in the *debet* as well as *detinet*. In this case, however, a Judge's order is necessary for the purpose of holding the defendant to bail; and the judge may be satisfied of the *devastavit*, either by the sheriff's return (if the *devastavit* have been returned), or by affidavit of the fact (t).

*Infants and lunatics.*] An infant should not be holden to bail for any debt or other matter, where the plea of infancy would be a legal bar to the action. If holden to bail, however, the Court, it should seem, would not discharge him on entering an appearance, but would put him to plead his infancy (u).

Nor is insanity considered a sufficient ground for discharging a defendant on entering an appearance (x), even although the fact of insanity have been established by a commission of lunacy, previously to the arrest (y).

*Seamen and soldiers.*] No petty officer or seaman, marine or non-

(k) *Jones v. Lewis*, 7 Taunt. 55.

(l) *Wilson v. Serres*, 3 Taunt. 307.

(m) See *Slater v. Mills*, 7 Bing. 606, 5 M. & P. 603, 1 Dowl. P. C. 230, S. C.

(n) *Carlisle v. Starr*, 9 Price, 161.

(o) *Bro. Abr. Corporation*, pl. 43.

(p) See *post*, Vol. 2, Book 3, Part 3, Chap. 2, s. 2; 3 Keb. 126.

(q) *H. M.* 15 Car. 2, r. 2; 3 Bl. Com. 292; 2 Brownl. 293; 3 Bulst. 316.

(r) *Mackenzie v. Mackenzie*, 1 T. R.

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(s) *Page v. Price*, 1 Salk. 98; 1 Sid. 63; *Seaton v. Gilbert*, 2 Lev. 145; 1 Vent. 355; and see a form of affidavit, Chit. Forms, 34.

(t) *Carth.* 264; *Comb.* 206; and see *post*, Vol. 2, Book 3, Part 3, Chap. 5.

(u) *Madox v. Eden*, 1 B. & P. 480.

(x) *Nutt v. Verney*, 4 T. R. 121; *Kernot v. Norman*, 2 T. R. 300.

(y) *Steel v. Alan*, 2 B. & P. 362



commissioned officer of marines, on board any of his Majesty's vessels, shall be holden to bail or arrested in execution for any debt whatsoever, contracted subsequently to his having entered the service; nor for any debt under 20*l.* contracted previously to his having so entered. (32 *G. 3, c. 33, s. 22*; 1 *G. 2, st. 2, c. 14, s. 15*). But for any debt above 20*l.* contracted previously to his entry into the service, the plaintiff, or some person on his behalf, may make affidavit before a judge or commissioner, that the sum justly owing from the defendant to the plaintiff, or the debt, (including damages and costs) for which execution is intended to be issued, amounts to 20*l.* at least, and that the debt was contracted previously to the defendant's belonging to his Majesty's service; a memorandum of which oath shall be marked on the back of the process or writ. (1 *G. 2, st. 2, c. 14, s. 15*). Upon this affidavit the plaintiff may cause the defendant to be arrested, either upon mesne process or in execution.

If such seaman, &c. shall be arrested, contrary to the provisions of this act, any of the judges of the Court out of which the process or execution shall have issued, upon complaint either of the defendant or of one of his superior officers, may examine into the same by the oath of the parties or otherwise, and, by warrant under his hand and seal, may discharge the defendant, without payment of any fees, upon due proof that he belongs to one of his Majesty's vessels, and that he is arrested contrary to the intent of the act; and may also award to the defendant such costs as he shall think reasonable. (1 *G. 2, st. 2, c. 14, s. 15*; 32 *G. 3, c. 33, s. 22*). Or, if in such a case the defendant have put in special bail, the Court, upon application, will order an *exoneretur* to be entered upon the bail piece (*z*); but where such a defendant had given a bail bond, and the plaintiff proceeded against the bail upon the bond to judgment, the Court held that the bail were too late in applying to them for relief (*a*). It has been holden, however, that such a defendant may be rendered by his bail in their own discharge (*b*).

If such a defendant pay the debt for which he has been arrested, give a bail bond, or be otherwise entitled to be discharged out of custody, the sheriff, &c. in whose custody he shall be, instead of discharging him, shall, under the penalty of 100*l.*, have him conveyed to the commander of one of his Majesty's ships, or some authorized commissioned officer, in order that he may be kept to serve on board the fleet as before. (44 *G. 3, c. 13, ss. 1 & 4*) (*c*).

Armourers, gunners, &c. enlisted as common seamen, are within the meaning of these statutes (*d*); so is every seaman whose name is on the ship's books, notwithstanding he may have absented himself (*e*).

In cases where such a defendant cannot be holden to bail, according to the above statutes, then, upon giving notice in writing of the cause of action to such seaman, or by leaving it at the place where

(*a*) *Robertson v. Patterson*, 7 East, 406; and see *Say*, 107.

(*a*) *Bryan v. Woodward*, 4 Taunt. 557.

(*b*) *Bond v. Isaac*, 1 Bur. 339.

(*c*) See *Sturmy v. Smith*, 11 East, 25.

(*d*) *Barnesley v. Archer*, Barnes, 114.

(*e*) *Studwell v. Bunton*, *Id.* 95.

he usually resided previously to his entering his Majesty's service, the plaintiff may enter a common appearance for the defendant, so as to entitle him to proceed to judgment, and to have execution other than against the person of the defendant. (1 G. 2, st. 2, c. 14, s. 16).

The annual mutiny acts in general make the same regulations as to soldiers which the above statutes do as to seamen and marines (f).

*Where the defendant has been before arrested for the same cause of action.*] If a defendant be once arrested, he cannot, in general, be arrested again at the suit of the same plaintiff, for the same cause of action (g). Thus, if a defendant be superseded for the laches of the plaintiff, he cannot afterwards be holden to bail for the same cause of action; even although, after his discharge, he give the plaintiff his promissory note for the amount of the debt, and the second arrest is upon the note thus given (h); or although the second arrest be in a different form of action, provided it be for the same cause (i). In a late case, where a plaintiff arrested a defendant for the amount of two items, and recovered for one only, offering no evidence on the other, the Court discharged the defendant on entering an appearance, upon the plaintiff arresting him a second time for the item in respect of which no evidence had been offered in the first action (k). And where the plaintiff made a mistake in the affidavit of debt for which the defendant was discharged on entering an appearance, and the plaintiff again arrested him in a second action on a fresh affidavit, the defendant was again discharged on account of the previous arrest (l). By the rule of II. T. 2 W. 4, reg. 7, it is ordered, that after a non pros, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge (m). Such order would not be granted unless under special circumstances, as where the bail in the first action had forsworn themselves, &c. (n).

But when a party gets rid of an arrest by *subterfuge* or *fraud*, the plaintiff may arrest him again. Thus, where a defendant, on being arrested, gave the plaintiff a draft for part of the debt on a person with whom he had no connection, and promised to settle the remainder in a few days; the draft not being paid when presented for payment, the plaintiff sued out a new writ on the former affidavit, and had the defendant arrested on it; and the Court held that he was justified

(f) As to the denomination of soldiers within the meaning of these mutiny acts, see *Lloyd v. Wooddall*, 1 W. Bl. 29, 1 Wils. 216, S. C.; *Bayley v. Jenners*, 1 Str. 2; *Johnson v. Lowth*, 1 Stra. 7, 10 Mod. 346, S. C.; *Flanders v. Nicholls*, Barnes, 432; *Bowler v. Owen*, 2 T. R. 270; *R. v. Archer*, 1 Bur. 636, 637, 446; *R. v. Dawes*, 8 East, 105; and see *Rickman v. Studwick*, 2 L. Raym. 1246; *Bryan v. Woodward*, 4 Taunt. 557.

(g) See R. M. 15 Car. 2, s. 2, post, 77, *Belifante v. Levy*, 2 Str. 1209; *Housin v. Barrow*, 6 T. R. 218; *McClure v. Pringle*, 13 Price, 8, M'Clel. 2, S. C.

(h) *Taylor v. Wasteneys*, 2 Str. 1218;

*Daniel v. Dodd*, 8 East, 334.

(i) *Imlay v. Ellefsen*, 3 East, 309. See *Musgrave v. Meder*, 8 Taunt. 24; *England v. Lewis*, 3 D. & R. 189.

(k) *Hamilton v. Pitt*, 7 Bing. 230; 4 M. & P. 868, 1 Dowl. P. C. 209, S. C.

(l) *Bostock v. White*, cor. Tenterden, C. J., at chambers, 6th Sept. 1830.

(m) See the former cases of *Wheelwright v. Joseph*, 5 M. & S. 93; *Bat's v. Barry*, 2 Wils. 381; *White v. Gompertz*, 5 B. & Ald. 905, 1 D. & R. 556, S. C.; *Belifante v. Levy*, 2 Stra. 1209; *Turton v. Hayes*, 1 Stra. 439; *Kearney v. King*, 1 Chlt. Rep. 273.

(n) See *Olmus v. Delany*, 2 Str. 1216.

in doing so, for the draft was a fraud on the plaintiff (*o*). But in another similar case, where the security given by the defendant was merely worthless, and there was no fraud, the Court would not sanction the defendant's second arrest (*p*).

If the defendant be discharged out of custody for some act for which the plaintiff is not answerable, as, for an alteration in the sheriff's warrant, or the like; the defendant, in such case, may be again holden to bail for the same cause of action (*q*). Where the defendant had given a bond conditioned to pay a sum of money, if a sentence of a vice-admiralty court should be affirmed on appeal; and the appeal being afterwards dismissed for want of prosecution, the defendant was arrested and holden to bail on the bond; the appeal, however, was afterwards restored upon petition, and the action consequently was suspended, and the bail discharged; but being again dismissed, the plaintiff commenced a new action on the bond, and again held the defendant to bail: and the Court, under these circumstances, refused to discharge him (*r*). Where the judgment in the first action (unless perhaps a judgment of *nonpros*, nonsuit, or discontinuance, *R. II. 2 W. 4, ante*, 75) has been reversed for error (*s*), the plaintiff may, after payment of costs, hold the defendant to bail in a new action for the same cause (*t*). There must, however, be no vexation in the plaintiff's second action.

Where the first action is compromised, and a second action brought for the same cause, the Court will not discharge the bail bond taken on an arrest, unless the proceedings appear to be vexatious (*x*). And where a defendant is let out of custody at his own request, to give him an opportunity of attending to his business, he may be again arrested on the same affidavit (*y*).

If the defendant have not been holden to bail, but merely served with process, in the first action, the plaintiff may hold him to bail in a second action for the same cause; for such a case is clearly not within the rule above mentioned (*z*). And this may be done, even before the first action is discontinued (*a*). A defendant who has been arrested in a foreign country may be again arrested in this country for the same cause of action (*b*). So where the defendant had surrendered upon a foreign attachment sued out in the mayor's court in London, and the plaintiff thereupon abandoned the suit, and held the defendant to bail in an action in this Court for the same cause; the Court refused to discharge the defendant on entering a common appearance (*c*).

(*o*) *Puckford v. Marrell*, 6 T. R. 52.

(*p*) *Wilson v. Hammer*, 8 Bing. 54, 1 M. & Scott, 120, 1 Dowl. P. C. 248, S. C.

(*q*) *Houlin v. Barrue*, 6 T. R. 218.

(*r*) *Woodmeston v. Scott*, 1 New Rep. 13.

(*s*) *Cartwright v. Keely*, 7 Taunt. 192.

(*t*) *Tierton v. Huges*, Str. 439.

(*u*) *Brown v. Davis*, 1 Chit. Rep. 161.

(*y*) *Penfold v. Marrell*, 1 Chit. Rep.

(*z*) *Davison v. Cleworth*, 1 Chit. Rep. 275.

(*a*) *Bishop v. Pocrell*, 6 T. R. 616, Anon. 1 Dowl. P. C. 59; *Id.* 57.

(*b*) *Mauls v. Murray*, 7 T. R. 470; and see *Imley v. Kelsen*, 2 East. 453.

(*c*) *Bromley v. Peck*, 5 Taunt. 352 n.; *Wood v. Thompson*, *Id.* 851. See *Paine v. Gaudery*, 3 D. & R. 33; *Muggrave v. Mades*, 8 Taunt. 24. But see *England v. Lewis*, 3 D. & R. 163.

Where the plaintiff arrests the defendant and dies, his executors may again arrest the defendant for the same cause (*d*). So, where the plaintiff becomes bankrupt before interlocutory judgment, the defendant may be arrested and held to bail by the assignees in a second action for the same cause (*e*). But where the defendant has been arrested in an action brought in the name of a bankrupt by the authority of his assignees, he cannot afterwards be arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued and the costs taxed and paid (*f*).

It is doubtful whether a party can, in any case, be arrested a third time for the same cause of action (*g*).

Where a plaintiff sued out writs into two counties, and arrested the defendant in both, who gave bail upon each arrest; the Court of Common Pleas directed that the bail given upon the first arrest should stand; but that the proceedings upon the second arrest should be set aside with costs to be paid by the plaintiff (*h*).

Where the defendant has been wrongfully arrested or detained in custody.] If the defendant be wrongfully taken without process, or on void process (*i*), or after it is no longer in force, &c. (*j*), or whilst he was privileged from arrest, or the like (*k*), he cannot be lawfully detained in custody under other process at the suit of the same plaintiff, though regularly issued. Where, by the contrivance of the plaintiff's attorney, a party had been arrested on a Sunday on a criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till the Monday, and then arrested on the civil process, the Court ordered him to be discharged out of custody (*l*).

Also, by rule of *M. T.* 15 C. 2, s. 2, it is ordered, that if a defendant be lawfully delivered from arrest upon any process, he shall not be arrested again at the same time, by virtue of another process, at the suit of the same plaintiff: and if any attorney shall herein offend, his name shall be struck off the roll; and he and the plaintiff shall receive such punishment as to the Court shall seem just. If therefore the defendant be entitled to his discharge, the same plaintiff cannot, while he is in custody, or while he is returning from custody, and until he completely regain his liberty, lodge a detainer, or arrest him on process, though for a totally different cause of action (*m*). But if the defendant delay going out of custody, it seems he might, in such case, be arrested. And it has been held that the plaintiff might lodge a detainer against the defendant in custody upon mesne process, after his bail had justified, the defendant not having completed his discharge, but being still within the prison; and that he was not entitled to be discharged upon an affi-

(*d*) *Mollin v. Evans*, 1 C. & J. 82.

(*e*) *Barnes v. Maton*, Tidd, 9th ed. 175, 176, 15 East, 631, S. C.

(*f*) *Carter v. Hart*, 1 Chit. Rep. 276.

(*g*) *Wells v. Gurney*, 8 Barn. & Cres. 769.

(*h*) *Bullock v. Morris*, 2 Taunt. 67.

(*i*) 2 Anstr. 461; *Birch v. Procter*, 1

New Rep. 135; *Attorney-Gen. v. Dor-  
kings*, 11 Price, 156.


(*j*) *Loveridge v. Plaistow*, 2 H. Bl. 29.

(*k*) *Barratt v. Price*, 9 Bligh. 569.

(*l*) *Wells v. Gurney*, 8 Barn. & Cres. 769.

(*m*) See *Farmer v. Jenkinson*, Cook. 34; *Webb v. Dorwell*, Barnes, 400.

davit that the sum for which the detainer was lodged was due at the time of the first arrest (*n*). Where a defendant being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum; and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer, it was held that this detainer was regular (*o*).

The above rules do not apply to detainers or arrests by *third persons*, unless there be some collusion between them and the plaintiff (*p*), or unless the first arrest were illegal by the wrongful act of the sheriff himself (*q*). 

## 2. *In what Actions the Defendant may be holden to Bail.*

It is unnecessary here to consider in what actions a defendant could be arrested at common law, or by the early statutes upon this subject; the practice in this respect being at present regulated by the statute 7 & 8 G. 4, c. 71 (*r*).

*The amount.*] By stat. 7 & 8 G. 4, c. 71, s. 1, no person shall be held to special bail where the cause of action shall not have originally amounted to 20*l.* or upwards, over and above and exclusive of any costs, charges, and expenses that may have been incurred, recovered, or become chargeable in or about the suing for or recovering the same or any part thereof; and if the cause of action do not amount to 20*l.* or upwards, exclusive of costs, &c., the defendant shall not be arrested, but may be served personally with a copy of the process. By section 9 of the same act, all arrests contrary to the provisions of the act are declared altogether illegal and void. And, by section 7 of the same act, in the principality of Wales and the counties palatine of Chester, Lancaster, or Durham, a defendant shall not be holden to bail upon process out of the Courts at Westminster, unless such process be duly marked and indorsed for bail in a sum not less than *fifty pounds*. So much, however, of this section as relates to Wales and Cheshire is virtually repealed by the 11 G. 4 & 1 W. 4, c. 70; and now, defendants in Wales and Cheshire may be arrested upon process issued out of the superior Courts at Westminster, in like manner as defendants in other counties.

*The nature of the cause of action.*] The general rule adopted by the Court, in their construction of the above act of 7 & 8 G. 4, (which is in most respects worded the same as the prior acts), is, that, where the cause of action arises from a debt or money demand, or where it sounds in damages, but the damages may be ascertained with certainty by mere calculation; the defendant may be holden to bail, as of course. But where the cause of action sounds merely in *damages*, and those da-

(*n*) *Quin v. Reynolds*, 3 M. & S. 144.

(*o*) *White v. Gompertz*, 5 B. & Ald. 905, 1 D. & R. 556, S. C. but differently reported.

(*p*) *Houson v. Walker*, 2 Bla. Rep. 823; *Spence v. Stuart*, 3 East, 89; *Davies v. Chippendale*, 2 B. & P. 282;

*Hutchins v. Kendrick*, 2 Burr. 1048; *Barclay v. Faber*, 2 Barn. & Ald. 743, 1 Chit. Rep. 579, S. C.

(*q*) *Barratt v. Price*, 9 Bingh. 566.

(*r*) See the acts 12 G. 1, c. 29, and 51 G. 3, c. 124, s. 1.

mages are *unliquidated*, or cannot possibly be reduced to any degree of certainty without the intervention of a jury, the defendant shall not be holden to bail unless a *Judge's order* be first obtained for that purpose. As in the following instances:

*Assumpsit.*] Where the action sounds in debt, as where it is brought for goods sold, money lent, or on a bill of exchange or promissory note, or the like, the defendant may be holden to bail, as of course; but where it sounds merely in damages, and those damages are unliquidated, as for breach of an agreement to receive or deliver goods, or the like, special bail cannot be required, unless upon a Judge's order (*r*). Therefore the defendant cannot be holden to bail, in an action upon a policy of insurance, where there has been no adjustment, although the plaintiff swear to a total loss, or the defendant have made an unqualified offer to pay a part of it; for this is an action for unliquidated damages (*s*). Where a defendant was arrested in an action on a contract, the legality of which was doubtful, and which might eventually subject the plaintiff himself to a penalty, the Court of Common Pleas discharged the defendant on a common appearance (*t*). That Court also discharged a defendant on a common appearance, who had been arrested in an action on the prothonotary's *allocatur* for costs; and they doubted if such an action would lie (*u*). Where the plaintiff, being surety for the defendant, before the latter obtained his discharge under an insolvent act, was afterwards obliged to give a new security by bond and warrant of attorney, &c., the Court held clearly that he could not hold the defendant to bail, until he had first paid the debt (*x*). Also where a party obtained a judgment in a foreign court, in a suit for a malicious prosecution, the Court held that he could not hold the defendant to bail in an action here upon that judgment (*y*).

Where the cause of action is such that the defendant may be holden to bail as of course, yet if there have been mutual dealings between the parties, the defendant should be holden to bail for the balance only (*s*). Yet where the defendant, in such a case, had refused to furnish any account of the work done by him for the plaintiff, the Court of Common Pleas held that the plaintiff was justified in holding the defendant to bail for the full amount of the goods sold to him (*a*).

A defendant cannot be arrested on an affidavit merely for goods bargained and sold (*b*), or for goods sold only (*c*), without averring that they are delivered; because the plaintiff ought not to have the

(*r*) See *Waters v. Joyce*, 1 D. & R. 150.

(*s*) *Lear v. Heath*, 5 Taunt. 201.

(*t*) *Sumner v. Green*, 1 M. Bl. 301.

(*u*) *Fry v. Malcolm*, 4 Taunt. 765; and see *Emerson v. Lashley*, 2 H. Bl. 251.

(*v*) *Taylor v. Higgins*, 3 East, 169.

(*w*) *De Balf v. Mackenzie*, 2 Str. 1243.

(*x*) *Turlington's case*, 4 Bur. 1096;

*Dromfield v. Archer*, 1 D. & R. 67, 5 B. & Ald. 513, S. C.; *Austin v. Debnam*, 4 D. & R. 653, 3 Barn. & Cres. 126, S. C.

(*a*) *Gormin v. Burrows*, 5 Taunt. 259.

(*b*) *Hephins v. Vaughan*, 12 East, 398.

(*c*) *Lolanda v. Morpess*, 8 Moore 366, 1 Bing. 357, S. C.

security of the person under the arrest, as well as the security of the goods. A defendant may be arrested on a written guarantie or undertaking to be answerable to a certain amount for goods sold to a third person in the event of his failing to pay for them (*d*). So, it should seem, a defendant might be arrested for *stipulated damages*, if clearly such, but not for a penalty (*e*).

*Debt.*] In debt on simple contract the defendant may be holden to bail, as of course.

In debt on bond, the defendant may be holden to bail, unless it be a replevin or bail bond (*f*), *ante*, *p.* 70. If it be a bond conditioned for the payment of money, the defendant should be holden to bail merely for the principal and interest due on it, and not for the penalty (*g*). So in bonds conditioned for the performance of covenants, or to indemnify, or the like, bail should be required to the amount only of the real damage sustained, and not to the amount of the penalty (*h*); although it may perhaps be doubtful if the Court in such cases would discharge a defendant out of custody, if arrested for the penalty (*i*). But in all cases where the penalty is in the nature of *liquidated damages*, as where a bond is conditioned for the performance of a promise to marry (*k*), or the like, the defendant may be holden to bail for the penalty; the penalty in such a case being the debt in law.

In debt on a recognizance of bail, the defendants cannot be holden to bail, as we have already seen, *ante*, *p.* 70; and though an arrest is not, as we have just seen *supra*, permitted in an action of debt upon a bail or replevin bond, yet after judgment is obtained against the bail in such action, he may be arrested in an action on the judgment (*l*).

In debt on judgment, special bail cannot in general be required, if the defendant have been holden to bail in the original action (*m*); although the bail in the original action have absconded or become insolvent (*n*); or although the defendant were superseded in the first action (*o*), unless the *supersedeas* have been gained by surprise, and not by the laches of the plaintiff (*p*); or even although the plaintiff had waived the bail in the first action, by declaring for a different

(*d*) *Cope v. Joseph*, 9 Price, 155. See a form of affidavit, *Chit. Forms*, 30.

(*e*) See *Wilkey v. Thornton*, 2 East, 400; *Stinton v. Hughes*, 6 T. Rep. 13. As to the difference between *stipulated damages* and *penalties*, see *Kemble v. Farren*, 6 Bligh, 141; *Darby v. Penton*, 6 B. & Cres. 216, and cases there cited.

(*f*) *Ormond v. Brierley*, 1 Salk. 109; *Brandon v. Robson*, 6 T. R. 330; *Mollish v. Petherick*, 8 Id. 450.

(*g*) See *Tulbot v. Hodson*, 7 Taunt. 231.

(*h*) 1 Sid. 63. *Stapleton v. Baron de Stark*, Barnes, 109; *Anon.* 1 Salk. 100; *Say*, 100; *Hatfield v. Linguard*, 6 T. R. 217; *Kirk v. Strickland*, Doug. 449.

(*i*) See 1 Sellow, Pr. 37; but see *Edwards v. Williams*, 5 Taunt. 247; *Hatfield v. Linguard*, 6 T. R. 217.

(*k*) *Kirk v. Strickland*, Doug. 449; and see *Kettley v. Whalley*, Barnes, 62.

(*l*) *Butt v. Moore*, Tidd, 9 ed. 173; *Prendergast v. Davis*, 8 T. R. 85.

(*m*) *Kendal v. Cary*, 2 W. Bl. 768; and see *Cullins v. Powell*, 2 T. R. 756.

(*n*) *Bowen v. Barnett*, Say, 160.

(*o*) *Hall v. Howes*, 2 Str. 1039, *Chambers v. Robinson*, Id. 782; *Blandford v. Foot*, Cowp. 72; *Huggins v. Bambridge*, Barnes, 383; but see *De la Cour v. Read*, 2 H. Bl. 278.

(*p*) *Whalley v. Martin*, Barnes, 62.

cause of action from that mentioned in the writ (*q*), or by taking a warrant of attorney from the defendant in the first action, the second action being upon the judgment entered up on the warrant of attorney (*r*). So, where a defendant was superseded in an action upon a judgment, and again arrested in an action upon the second judgment, the Court discharged him on entering an appearance (*s*). What has now been observed relates to actions upon judgments of the *superior* Courts only; but if the action be brought on the judgment of an inferior court, the defendant may be holden to bail, although he had been before holden to bail in the original action (*t*). Also, if the defendant were not holden to bail in the original action, he may in general be holden to bail in an action on the judgment (*u*), even although a writ of error be pending on it (*v*); provided the original cause of action were such that the defendant might have been holden to bail for it (*w*). Where a defendant obtains judgment, he might always, and still may in the Court of Common Pleas, hold the plaintiff to bail in debt on the judgment (*x*); in this Court it was formerly otherwise (*y*); but it seems that the practice of this Court, in this respect, has since been assimilated to that of the Common Pleas (*z*).

In debt on award, the defendant may be holden to bail; although he had before been holden to bail for the same cause of action which was the subject of the award (*a*).

In debt on penal statutes, the defendant cannot be holden to bail (*b*), unless the statute expressly authorize an arrest (*c*); but in actions on remedial statutes, as on 9 *A. c.* 14, by the loser at play against the winner (*d*), or on 4 *G. 2*, c. 28, for double rent for holding over (*e*), or the like, he may.

*Covenant.*] In covenant the defendant cannot be holden to bail, unless the covenant be for the payment of a sum certain. *R. E.* 5 *G. 2*.

*Detinue.*] In detinue, the defendant cannot be holden to bail without a Judge's order. (*R. II.* 48 *G. 3*) (*f*). In order to obtain such order, proceed as directed, *post*, 82.

(*q*) *Crutchfield v. Seyward*, 2 Wils. 93.

(*r*) *Salkeld v. Linds*, 2 B. & P. 416.

(*s*) *Chambers v. Robinson*, 2 Str. 782.

(*t*) *Davies v. Leake*, Barnes, 94.

(*u*) *Hesse v. Strenham*, 1 New Rep. 3. 133; and see *Combes v. Blackall*, 1 Str. 477.

(*v*) *Kendal v. Carey*, 2 W. Bl. 768; Comyns, 566; *Weyman v. Weyman*, Barnes, 71.

(*w*) See *Gammage v. Watkin*, 2 Str. 975; Cowp. 128; *Palmer v. Needham*, 3 Bur. 1389; *Belither v. Gibbs*, 4 Id. 2117; *Lewis v. Pottle*, 4 T. R. 570; 1 Wils. 120; and 43 *G. 3*, c. 46.

(*x*) *Nightingale v. Nightingale*, 2 W.

Bl. 1274.

(*y*) *Bush v. Bates*, 5 Bur. 2660.

(*z*) See *Lewis v. Pottle*, 4 T. R. 570;

1 Selon, Pr. 39, 40.

(*a*) *Collins v. Powell*, 2 T. R. 756.

(*b*) *St. George's case*, Yelv. 53; 2 Brownl. 293; *Whittingham v. Coghlan*, Barnes, 60, Comyns, 75.

(*c*) See *R. v. Rolord*, 3 Bur. 1560; *Davis v. Mazzinghi*, 1 T. R. 705; *Holland v. Bothmar*, 4 T. R. 228; *R. v. Horne*, Id. 349; *Goodwin v. Parry*, Id. 578.

(*d*) *Turner v. Warren*, 2 Str. 1079; Andr. 70, q. C.

(*e*) *Wheeler v. Copeland*, 5 T. R. 364.

(*f*) 9 East, 325; 1 Taunt. 203.



**Trespass.]** In trespass, also, the defendant cannot be holden to bail, without a Judge's order; and this is seldom granted, unless in cases of very violent and cruel assaults (*g*), or where the defendant is about to quit the kingdom (*h*), or in trespass for mesne profits (*i*). To obtain a Judge's order in such a case, *prepare an affidavit stating all the material facts of the case (j); after having it sworn before a Judge, let it be laid before him; and if he approve of it, he will make an order that the defendant shall be holden to bail, in a sum therein specified (k).*

**Case.]** So, in an action on the case for a tort, the defendant cannot be holden to bail without a Judge's order. This is sometimes granted in actions for criminal conversation (*l*), and in actions for *scandalum magnum* (*m*).

**Trover.]** In trover, the defendant cannot be holden to bail, without a Judge's order (*n*). *To obtain this order, proceed as above directed.* If an order be granted, the Court will not in general enter into the question of merits afterwards, in order to discharge the defendant on a common appearance (*o*).

### 3. The Affidavit to hold to Bail.

An affidavit of the cause of action must be made and filed; and the sum specified in such affidavit must be indorsed on the back of the writ or process (*p*); otherwise the defendant must be merely served with a copy of the process, and not holden to bail. 12 G. 1, c. 29, s. 2. The consequence of there being no such affidavit, or of the affidavit being defective, will be seen hereafter, *post*, 93, 94.

The following are the rules to be attended to in the framing of this affidavit. *When prepared, write it on plain paper (q).*

**How intituled.]** The affidavit should be intituled "In the King's Bench" (*r*); unless, indeed, it be sworn before a judge of that Court, in which case it need not be so intituled. (*R. II. 2 W. 4, r. 4*). An affidavit not intituled in the Court, but purporting, at the foot, to have been sworn before "J. Y., deputy filacer" (*s*); or "at the King's Bench Office, Inner Temple, before me, J. C." (*t*), has been lately held

(*q*) 1 Sellow, Pr. 36.

(*h*) *Id.*

(*i*) *Hunt v. Hudson*, Barnes, 85.

(*j*) See *Davies v. Chippendale*, 2 B. & P. 282; and see forms of affidavit, Chit. Forms, 35, 36.

(*k*) See a form of order, Chit. Forms, 36.

(*l*) *Hadderweek v. Catmur*, Barnes, 61.

(*m*) 1 Sid. 183; *Earl Stamford v. Gordon*, T. Raym. 74.

(*n*) R. 11. 48 G. 3; 9 East, 325, 1 Taunt. 203; and see the forms, Chit.

Forms, 35, 36.

(*o*) *Drackebury v. Needham*, 1 Dowl. P. C. 430.

(*p*) See the form of the *capias* and indorsements as prescribed by the 2 W. 4, c. 39, *post*, 96, 97.

(*q*) See the various forms, Chit. Forms, 16 to 36.

(*r*) *Molling v. Poland*, 3 M. & S. 157; *R. v. Hare*, 13 East, 189; and see *Kennet v. Jones*, 7 T. R. 451.

(*s*) *Bland v. Drake*, 1 Chit. Rep. 165.

(*t*) *Howell v. Wilkin*, 7 B. & Cres. 783.

sufficient. It must not be intituled in any cause, nor (if so intituled) shall it be read if filed. (R. T. 37 G. 3, 7 T. R. 454) (u).

*Deponent's addition, and names of parties.* The affidavit must state the true place of *abode*, and the true *addition*, of the degree or mystery of the person making it; (R. M. 15 C. 2; R. H. 2 W. 4, r. 5); otherwise the Court will discharge the defendant on entering a common appearance (w). Where a deponent described himself as of "the city of London, merchant," it was holden to be sufficient (x). Where a foreigner who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient (y). Where a clerk described himself of the office where he did business during the day, although he slept elsewhere at night (z); and where a person lately discharged from prison, but who still slept there at night, described himself as *late* of that prison (a); the Court held these to be sufficient descriptions of the deponent's place of abode, within the meaning of the rule of Court above mentioned. But a deponent cannot describe himself as *late* of a place where he has ceased to reside, when he actually resides at another place at the time of making the affidavit (a). And where the deponent described himself as of Dorset Place, Clapham Road, Middlesex, and his true place of residence was Dorset Place, Clapham Road, Surry, the Court, upon application, ordered the bail bond to be delivered up to be cancelled (c). The Court, however, have refused to try the real place of the deponent's abode upon affidavits (d). As to the *addition* of the deponent's degree or mystery, "merchant," (x), and "manufacturer" (f), have been considered sufficient.

In general, the affidavit must set forth the christian and surname of the *defendant* in full (g); and the adoption of initials or contractions will not suffice (h). But by the recent act, 3 & 4 W. 4, c. 42, s. 12, "in all actions upon *bills of exchange* or *promissory notes*, or other *written instruments*, any of the parties to which are designated by the initial letter or letters, or some contraction of the *christian* or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the *christian* or first name or names, instead of stating the christian or first name or names in full." Also, by the rule of H. T. 2 W. 4, r. 32, in other cases, "where the defendant is described, in the process or affidavit to hold to bail, by initials, or by a wrong name or without a christian name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled, if it shall appear that *due diligence has been used to obtain knowledge of the proper name*" (i). An affidavit, that "*Edward Joyce*" is indebted in a sum due to the deponent from

(u) See *Hollis v. Brandon*, 1 B. & P. 36; *Green v. Redshaw*, Id. 227.

(v) *Jarrett v. Dillon*, 1 East, 18.

(x) *Vassier v. Alderson*, 3 M. & Sel. 165.

(y) *Bruhet v. Kittoe*, 3 East, 154.

(z) *Haskop v. Thorne*, 1 M. & Sel. 103; *Anon.* 2 Chit. Rep. 15.

(a) *Sedley v. White*, 11 East, 529.

(c) *Collins v. Goodyer*, 2 B. & C. 563, 4 D. & R. 44, S. C.

(d) *Anon.* Tidd, 9th ed. 179, 2 Smith, R. 307, S. C.

(f) *Onborn v. Gough*, 3 B. & P. 550.

(g) *Waters v. Joyce*, 1 D. & R. 150.

(h) *Reynolds v. Hankin*, 4 B. & Ald. 536.

(i) See form Chit. Sum. Prac. 13.

"George Page Edward Joyce," is bad (*j*). It is not necessary to give an addition to the *defendant*, or to the plaintiff, if not the deponent.

The name of the plaintiff or defendant, as stated in the affidavit, must be so stated in the declaration; otherwise, the bail will, in general, be discharged. (*Post*, 90).

*Cause of action.*] The general rule as to the statement of the cause of action is, that the affidavit must be such that perjury may be assigned on it, if false. The allegations in the affidavit are, for the purposes of the arrest, conclusive on the defendant, and are not traversable; it ought, therefore, to be certain, and nothing left to intendment (*k*).

The affidavit, therefore, must, in the first place, be *positive* as to the existence of the debt or other cause of action, and not merely argumentative (*l*). Therefore, swearing to the debt, "as the deponent believes" (*m*); or "as appears by the bond;" or, "by the books," or the like (*n*); or "as appears by the master's *allocatur*" (*o*); or "according to the bill delivered by the plaintiff to the defendant" (*p*); or even swearing that defendant is indebted to the plaintiff in a certain sum, adding "for which he has not accounted" (*q*); or where the affidavit is not positive as to the debt, but merely states the circumstances of the case, and then adds "therefore the defendant is indebted, &c." (*r*); or where the affidavit states that the defendant is indebted unto the plaintiff for goods sold and delivered, &c. to defendant, and proceeds to state that the plaintiff has received no other security save some bills of exchange, over due and unpaid, without stating that the plaintiff is the holder thereof (*s*); in these cases the affidavit is insufficient, and the Court will discharge the defendant on entering a common appearance. But an affidavit that the defendant is indebted to the plaintiff in such a sum "as he computes it," is good (*t*). So, in an affidavit to hold to bail, made by the plaintiff's agent, (the plaintiff himself being abroad), a debt on a judgment being first positively sworn to, a subsequent statement that the judgment is still in force, unpaid and unsatisfied, "as deponent verily believes," will not vitiate it (*u*). And where it is *impossible* to swear *positively*, as where the cause of action arose from the non-payment of bills in India, it was holden sufficient for the party to swear that they were not paid "to his knowledge and belief" in India or elsewhere (*x*). So, where the plaintiff sues *in autre droit*, as executor or administrator, or as assignee of a bankrupt, it is not required that he should swear positively to the

(*j*) *Waters v. Joyce*, 1 D. & R. 150.

(*k*) *Fricke v. Poole*, 9 B. & C. 543; *post*, 94.

(*l*) *Sheldon v. Barker*, 1 T. R. 87; *Whoeley v. Copeland*, 5 T. R. 364; *Pomp v. Ludvigson*, 2 Bur. 635; *Van Morsel v. Julian*, 1 Wils. 231; *Long v. Lynch*, 3 Wils. 154.

(*m*) *Rice v. Bristow*, 2 Str. 1208; *Chapman v. Bowman*, Id. 1226.

(*n*) *Kelly v. Devereux*, 1 Wils. 339; *Rollin v. Mills*, Id. 279; *Anon.* Id. 121; *Heathcote v. Gosling*, 2 Str. 1157; *Walrond v. Franks*, Id. 1219, 1209; *Jen-*

*nings v. Martin*, 3 Bur. 1447; *Swarbrock v. Wheeler*, Barnes, 100; Say. 59.

(*o*) *Powell v. Forthwich*, 2 T. R. 55.

(*p*) *Williams v. Jackson*, 3 T. R. 575.

(*q*) *Champion v. Gilbert*, 4 Bur. 2126;

*Mackenzie v. Mackenzie*, 1 T. R. 716.

(*r*) *Mackenzie v. Mackenzie*, 1 T. R. 716; *Fowler v. Morton*, 2 B. & P. 48.

(*s*) *Booth v. White*, cor. Tenterden,

C. J., at Chambers, 5th Sept. 1831.

(*t*) *Moulty v. Richardson*, 2 Bur. 1032.

(*u*) *Bland v. Drake*, 1 Chit. Rep. 165.

(*x*) *Hobson v. Campbell*, 1 H. Bl. 245.

debt; and if an executor swear to his belief (*y*), or if an assignee of a bankrupt swear to the debt, "as appears by the bankrupt's books," or "by his last examination," or the like, "*and* as he verily believes" (*z*), it will be sufficient. But an affidavit by an executor, of the defendant's having been indebted to the testator "as appears from a statement made from the testator's books by an accountant employed to investigate the same, as deponent verily believes," has been held insufficient (*a*). So where an assignee of a bankrupt swore to a debt, as appeared from the letters of A. and B. "as this deponent believes," the affidavit was considered insufficient (*b*). So where the affidavit was made by a bankrupt who swore that the defendant was indebted to the deponent before the commission, and, "as he believes," was still indebted to his assignees, on a bill accepted by the defendant, indorsed by the drawer to deponent, and, "as he believes," still unpaid, the affidavit was considered insufficient (*c*). In the case of an assignee of a bond, or the like, he will be allowed to swear "to the best of his knowledge and belief," to all facts not within his own knowledge (*d*). If, in any of these cases, the executor, assignee, &c. take upon himself to swear positively to the debt, the affidavit will not be rejected on that account, however improbable it may be that he should have a positive knowledge of it (*e*).

An affidavit, stating that the defendant was indebted to B. for goods sold and delivered in Holland, and that the debt was assigned to the plaintiff, according to the laws of that country, and concluding with a statement, that the assignee of a debt may sue the debtor according to the laws of Holland, "as plaintiff is informed and believes," is sufficient to hold the defendant to bail here (*f*). But an affidavit that the defendant was indebted to the plaintiff as liquidator of an estate, duly appointed by the law of France, is bad, unless it shew, that by the law of France a liquidator is entitled to sue (*g*).

The affidavit must not only be positive as to the existence of the debt or other cause of action, but must also shew a *sufficient cause of action* for which the defendant *may be holden to bail* for the amount stated (*h*); and such cause of action must be stated explicitly, and with a sufficient degree of particularity and certainty (*i*). Therefore an affidavit that the defendant "is indebted to the plaintiff in *traver*" (*k*), or in so much "upon promises" (*l*), or in so much "as

(*y*) *Sheldon v. Baker*, 1 T. R. 37; *Roche v. Carey*, 2 W. Bl. 350; and see *Garnham v. Hammond*, 2 B. & P. 203; *Rooney v. Dean*, 1 Price, 402.

(*z*) *Scraper v. Cranford*, 4 T. R. 176; *Tonna v. Kluers*, 4 Bur. 2253; *Barclay v. Hunt*, Id. 1952; *Lowe v. Farley*, 1 Chit. Rep. 92.

(*a*) *Rooney v. Dean*, 1 Price, 402.

(*b*) *Mulling v. Buckholtz*, 2 M. & S. 563.

(*c*) *Tucker v. Francis*, 1 Bing. 142.

(*d*) *Creswell v. Lovell*, 8 T. R. 418; *Loveland v. Bassett*, 1 Wils. 232; and see *Fairman v. Farquharson*, 1 M. & P. 179.

(*e*) See *Androni v. Morgan*, 4 Taunt. 231; *Polleri v. De Souza*, Id. 154; and see *Knight v. Keyte*, 1 East, 415; *Byland*

*v. King*, 7 Taunt. 275; *Warmley v. Macey*, 2 B. & B. 339; and see the forms. Chit. Forms, 20, 31, 32.

(*f*) *Scherch v. Schmanuel*, 4 D. & R. 130. The Court, however, questioned whether B. was not the proper party to be made plaintiff.

(*g*) *Tenon v. Mars*, 8 B. & Cres. 630, 3 M. & R. 38, S. C. See *De la Vega v. Vianna*, 1 B. & Adol. 284, ante, p. 63.

(*h*) *Crooke v. Johns*, 1 H. Bl. 10; *Jacks v. Pemberton*, 5 T. R. 552.

(*i*) See *Wilks v. Adcock*, 8 T. R. 27.

(*k*) *Hubbard v. Pacheco*, 1 H. Bl. 218.

(*l*) *Cope v. Cook*, 2 Doug. 467; and see *Archer v. Ellard*, Say. 109.

a balance of accounts between the plaintiff and defendant" (y), is insufficient. So, an affidavit that the defendant is indebted to the plaintiff in 1000*l.* under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c., "which said balance is still due and unpaid," without stating that the balance was 1000*l.*, was deemed insufficient (z). So, an affidavit for so much for "interest money," under and by virtue of an agreement, is too general (a). So an affidavit to hold to bail for a certain sum for the breach of an agreement, must shew that the sum demanded is stipulated damages, and not merely a penalty (b); and even if for stipulated damages, it must state a breach of the agreement (c). And the plaintiff's swearing that they are "liquidated damages," will not of itself suffice (d). And wherever it appears that there is a condition precedent to be performed before holding the defendant to bail, the performance of it must, it seems, be averred (e). An affidavit, stating that defendant was indebted to plaintiff by virtue of certain articles of agreement, by which the latter agreed to sell, and the former to purchase certain lands, and that defendant had been let into possession in pursuance of the agreement, is not sufficient, without stating that a conveyance had been tendered to defendant (f). An affidavit on an agreement or promise not under seal, must, it seems, always shew a consideration (g); and where an affidavit upon an agreement to marry the plaintiff under a penalty, did not state the promises to be mutual, or shew other consideration for the promise to the plaintiff, it was held insufficient (h). An affidavit for money lent by plaintiff to defendant, for the use of another, and which the defendant promised to repay or cause to be secured to the plaintiff, was deemed bad, because it omitted to state that the money had not been secured according to the agreement (i).

An affidavit of debt on an award, ought to state the fact of the submission to, and the making of the award, and that the money was due at a day past (k). And, if the award direct the money to be paid by the defendant to the plaintiff upon demand, the affidavit must state such demand (l). An affidavit that the defendant is indebted for damages awarded, and for costs and expenses taxed and allowed, is sufficiently certain, for it will be inferred that the award and taxation are such as will support the action (m). An affidavit that the defendant is indebted to plaintiff "upon and by

(y) *Polleri v. De Souza*, 4 Taunt. 154; *Eicke v. Keane*, 2 Chit. Rep. 15.

(z) *Hatfield v. Lingard*, 6 T. R. 217.

(a) *Brook v. Trust*, 10 East, 358; and see *Anon.* 1 Salk. 100; 1 Sid. 63; *Whitfield v. Whitfield*, Barnes, 109; *Boanquet v. Willis*, 4 M. & S. 330.

(b) *Wildery v. Thornton*, 2 East, 409.

(c) *Stinton v. Hughes*, 6 T. R. 13.

(d) *Chambers v. Ward*, 1 Dowl. P. C. 139.

(e) *Elworthy v. Maunder*, 5 Bing. 295.

(f) *Young v. Dowdman*, 2 Y. & Jerv. 31; and see *Sykes v. Ross*, Id. 2.

(g) *Walker v. Gregory*, 1 Dowl. P. C. 24.

(h) *Macpherson v. Lovie*, 1 B. & Cres. 108, 2 D. & R. 69, S. C.

(i) *Jacks v. Pemberton*, 5 T. R. 552; see *Jenkins v. Law*, 1 B. & P. 365; *Elworthy v. Maunder*, 2 M. & P. 432, 5 Bing. 295, S. C., ante, 86.

(k) *Anon.* 1 Dowl. P. C. 5; see the forms, Chit. Forms, 34.

(l) *Driver v. Hood*, 7 B. & Cres. 494, 1 M. & Ry. 324, S. C.

(m) *Jenkins v. Law*, 1 B. & P. 365; and see *Muel v. Angel*, 6 D. & Ry. 15.

virtue of a charterparty of affreightment, bearing date, &c. for and on account of the hire of a ship, let to hire by plaintiff to defendant, and by him taken for a certain voyage from — to —," is sufficient (n). An affidavit that the defendant is indebted to plaintiff in trust for deponent, under a deed by which the defendant had covenanted to pay money "at certain times and on certain events now past and happened," is sufficient (q). An affidavit for so much, as principal and interest due on a bond, is sufficient, without stating the bond to be conditioned for the payment of money (p). But where the affidavit merely stated the defendant to be indebted to the plaintiff in 6000*l.*, on a bond in the penal sum of 25,000*l.*, the Court held it to be insufficient, as it did not appear what was the condition of the bond (q). The affidavit should, at all events, state that the bond is due and payable (r).

An affidavit to hold to bail on an Irish judgment must state the value of the sum recovered (s). So, where an affidavit, made before a British consul in a foreign country, stated that the defendant was indebted to the plaintiff in 100,000*l.* sterling, for money had and received, it was holden insufficient, because it did not appear with certainty whether the defendant was indebted in British sterling money (t).

An affidavit on a bill of exchange or promissory note, not expressly payable with interest, should specify the sum for which the bill or note is made, or otherwise shew that the sum for which the arrest is made is for principal money only (u). It must state that it is due and unpaid (x), or some other circumstance from which that fact may be presumed, as the date or time of acceptance, or that it was payable on demand, or on a day past, or the like (y). It must also shew how the defendant is indebted, and the character in which the defendant is sued, whether as acceptor, drawer, or indorser (z). But it is not necessary to state in what character the plaintiff claims, whether as payee or indorsee (u): though, in an action by an indorsee, it must be stated by whom the bill was indorsed; it is not enough to state that it was *duly indorsed* (b). An affidavit that the defendant was indebted to the plaintiff "on a bill of exchange drawn by M. D. on and accepted by defendant, and indorsed by M. D. to plaintiff,"

(n) *Skeen v. M'Gregor*, 8 Moore, 107, 1 Bing. 242, S. C.

(o) *Barnard v. Neville*, 3 Bing. 126, 10 Moore, 475, S. C.

(p) *Hyland v. King*, 7 Taunt. 275, 1 Moore, 24, S. C.

(q) *Bosquet v. Fillis*, 4 M. & Sel. 330; *Chambers v. Ward*, 1 Dowl. P. C. 139.

(r) *Smith v. Kendal*, 7 D. & Ry. 232.

(s) *Storie v. Ball*, 2 Chit. Rep. 16; *Kearney v. King*, 2 B. & Ald. 301; 1 Chit. Rep. 28, 273, S. C.

(t) *Pickardo v. Machado*, 4 B. & C. 886, 7 D. & R. 478, S. C.; *Abbott, C. J. diss.*

(u) MSS. Nov. 1832, K. B.; *Brook v. Colman*, 2 Dowl. P. C. 7, 6 Leg. Obs. 444, S. C.; overruling the cases of *Hanley v. Morgan*, 10 Law Journal, 2 C. & J. 330, 1 Dowl. P. C. 322; *Lewis v. Gompertz*, Id. 352, 1 Dowl. P. C. 319, S. C. in Exch.

(x) *Kirk v. Almond*, 1 Dowl. P. C.

318, 2 C. & J. 354, S. C.; MS. E. T. 1814; *Holcombe v. Lambkin*, 2 M. & Sel. 475; *Edwards v. Diok*, 3 B. & Ald. 495; *Machuv v. Fraser*, 7 Taunt. 171.

(y) *Kirk v. Almond*, 1 Dowl. P. C. 318, 2 C. & J. 354, S. C.; *Jackson v. Yate*, 2 M. & Sel. 148; *Eltone v. Mortlake*, 1 Chit. Rep. 648; and see *Mann v. Sheriff*, 2 B. & P. 355. See *Daivson v. Marsh*, 1 New Rep. 157, overruled.

(z) *Humphreys v. Window*, 6 Taunt. 531; *M'Taggart v. Ellis*, 4 Bing. 114.

(a) *Bradshaw v. Sadlington*, 7 East, 94; *Eltone v. Mortlake*, 1 Chit. Rep. 648. See *Balbi v. Batley*, 6 Taunt. 25; *Machuv v. Fraser*, 7 Taunt. 171; *Warmley v. Macey*, 2 B. & B. 338, 5 Moore, 52, 168, S. C.

(b) *Lewis v. Gompertz*, 2 C. & J. 352, 1 Dowl. P. C. 319, S. C.; *M'Taggart v. Ellis*, 4 Bingh. 114.

without saying that the bill was payable to order, is sufficient (d). In an action against the drawer or indorser, the affidavit must allege the default of the acceptor (e), but it need not allege notice of dishonour. An affidavit, stating that several persons are jointly indebted to the plaintiff, on a bill of exchange accepted in the name and firm of A. & Co., *by them, or one of them*, is insufficient (f).

An affidavit that the defendant is indebted to the plaintiff for goods sold and delivered, not stating "by the plaintiff to the defendant" (g), or for goods sold and delivered to the defendant, without saying "by the plaintiff" (h), or for goods sold and delivered *for* the defendant, instead of *to* the defendant (i), or for goods bargained and sold, without alleging that they were "delivered" (k), or for meat, lodging, &c. found and provided by plaintiff for defendant, and at his request, and for money paid, laid out, and expended, and lent and advanced by plaintiff "to" the defendant, and at his request, omitting the word "for" the defendant (l), or in "1000*l.* on *balance of account* for money paid, laid out, and expended by plaintiff, *to and for defendant*, and at his request, &c." (m), is bad. But an affidavit for money had and received on account of the plaintiff, without adding "by the defendant" (n), is sufficient. So, an affidavit that the defendant was indebted to plaintiff in 20*l.* lent and advanced on a bill of exchange for 37*l.*, drawn by J. S. on, and accepted by defendant, and now overdue and unpaid, is sufficient, without saying to whom the money was lent (o). So is an affidavit that the defendant is indebted to the plaintiff "for the use and occupation of a certain dwelling-house, &c. of the plaintiff," held and enjoyed by the defendant as tenant thereof: without saying, as tenant to the plaintiff, or that defendant held at his request (p). So, an affidavit, which states that defendant is indebted to plaintiff for the hire of divers carriages, &c. of plaintiff, to and for the use of defendant, is sufficient, without stating that they were hired of plaintiff, or by whom they were hired (q). So is an affidavit, stating the debt to be "for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," without expressly stating that the wages were due from the defendant (r). And an affidavit, stating that the defendant was indebted to the plaintiff in 130*l.* and upwards, for work and labour done, and for paper found by plaintiffs and their servants, in and about the printing of a certain book of defendant, and at his request, was holden to be sufficient to

(d) *Hughes v. Brett*, 6 Bing. 239; and see *Bradshaw v. Suddington*, 7 East, 141; *Bennet v. Dawson*, 4 Bing. 609, 1 M. & P. 504, S. C.

(e) *Ranting v. Jadis*, 1 Dowl. P. C. 443; *Cross v. Morgan*, Id. 122; *Buckworth v. Levy*, 7 Bing. 251, 5 M. & P. 23, 1 Dowl. P. C. 211, S. C.

(f) *Harmer v. Ashby*, 10 Moore, 323.

(g) *Perks v. Severn*, 7 East, 194; *Taylor v. Forbes*, 11 Id. 315; *Young v. Gaston*, 2 M. & Sel. 613.

(h) *Cathrow v. Hagger*, 8 East, 106; *Fenton v. Ellis*, 6 Taunt. 192.

(i) *Bell v. Thrupp*, 2 B. & Ald. 596, 1 Chit. Rep. 331, S. C.

(k) *Hopkins v. Vaughan*, 12 East, 308; *Loisada v. Moryoseph*, 8 Moore, 360, 1 Bing. 357, S. C.; *ante*, 79.

(l) *Fricke v. Poole*, 9 B. & C. 543.

(m) *Vlaser v. Delegal*, 2 B. & Adol. 571, 1 Dowl. P. C. 333, S. C.

(n) *Coppinger v. Beaton*, 8 T. R. 338.

(o) *Bennett v. Dawson*, 1 M. & P. 594, 4 Bing. 609, S. C.

(p) *Lee v. Sellwood*, 9 Price, 322; and *Boatock v. White*, cor. *Tenterden*, C.J., at chambers, 6 Sept. 1830, MS.

(q) *Brown v. Garnier*, 6 Taunt. 389, 2 Marsh. 83, S. C.

(r) *Symons v. Andrews*, 1 Marsh. 317.

shew that the work was done, and the materials found for the defendant, and at his instance (*s*). An affidavit, stating the defendant to be indebted to the plaintiff for money had and received to the use of his wife (*t*), is bad.

An affidavit to hold to bail for 50*l.* for money had and received to plaintiff's use, and money lent by plaintiff, without distinguishing how much is due on one account and how much on the other, is sufficient (*u*).

As regards the statement of defendant's request, it has been held that an affidavit for money lent and advanced (*x*), or for goods sold and delivered (*y*) to defendant, is sufficient, without stating expressly that the money was lent or the goods sold at defendant's request. But an affidavit for work and labour done, or for money paid for defendant's use, must state that the work was done and the money paid at defendant's request. (*R. II. 2 W. 4, r. 8*) (*z*).

An affidavit to hold to bail in trover, should state that the plaintiff was possessed of the goods, their value, and a conversion by defendant, either express or implied (*a*). Where it did not appear from the affidavit that the goods ever were in the possession of the defendant, the Court discharged him on entering a common appearance (*b*). But an affidavit that the defendants possessed themselves of divers goods belonging to the plaintiff, of the value of 20*l.*, and refused to deliver them up, and that they or some of them had converted and disposed of them to their own use, has been deemed sufficient (*c*). So, an affidavit that defendant was indebted to plaintiff in 103*l.* for goods, which the defendant converted to his own use, has been holden to be sufficient (*d*). In trover for a bill of exchange, the affidavit must allege that the bill remains unpaid (*e*).

An affidavit on a penal statute should specify the nature of the offence, and aver that the defendant has incurred the forfeiture (*f*); but the offence need not be described circumstantially (*g*); nor is it necessary to swear that the defendant is indebted to the plaintiff in the amount of the penalty (*h*). If such an affidavit state a statute, under which a penalty was incurred, to have been made in the 27 *G. 3*, which in fact was made in the 22 *G. 3*, it is a fatal objection, even although the title of the statute be correctly set forth (*i*). In an action for double rent under the statute, the affidavit stated a notice to quit, and a holding over by the plaintiff, "by reason of which and by force of the statute an action accrued," &c.; and it was deemed bad, because it did not state positively that the defendant was indebted, &c. (*k*).

(*s*) *Gale v. Lerkie*, 6 M. & Sel. 228.

(*t*) *Wade v. Wade*, 4 Bing. 50.

(*u*) *Huque v. Levi*, 9 Bingh. 595, 1 Dowl. P. C. 720, S. C.

(*v*) *Bostock v. White*, cor. Tenterden, C. J., at chambers, 6 Sept. 1830, MS.

(*y*) *Rowley v. Bayley*, 11 Moore, 383.

(*z*) See *Durnford v. Meusier*, 5 M. & Sel. 446; *Pitt v. New*, 8 B. & C. 654, 3 M. & R. 129, S. C.

(*a*) See *Molling v. Buckholtz*, 2 M. & Sel. 563. See the form, Chit. Forms, 35.

(*b*) *Woolley v. Thomas*, 7 T. R. 550.

(*c*) *Charter v. Jaques*, Cowp. 529.

(*d*) *Emerson v. Hawkins*, 1 Wils. 335.

(*e*) *Clarke v. Cauthorne*, 7 T. R. 321.

(*f*) *Dacie v. Mazzinghi*, 1 T. R. 705.

(*g*) *Id.*; *Watson v. Shaw*, 2 T. R. 654.

(*h*) *Davis v. Mazzinghi*, 1 T. R. 705.

(*i*) *Watson v. Shaw*, 2 T. R. 654. See the following cases on the lottery acts: *Res v. Horne*, 4 T. R. 349; *King v. Pacey*, 2 H. Bl. 601; *Pritchett v. Cross*, Id. 17; *Holland v. Bothmar*, 4 T. R. 228; *Goodwin v. Parry*, Id. 577.

(*k*) *Wheeler v. Copeland*, 5 T. R. 463.



The cause of action must also be stated with such precision, that perjury may be assigned on the affidavit, if untrue. Therefore, an affidavit that the defendant *is* indebted, instead of *is* indebted, was holden bad (*l*). Where a defendant was holden to bail under a Judge's order, upon an affidavit shewing that the plaintiff was damnified to such an amount; the affidavit was holden sufficient, although it improperly stated the defendant to be "*indebted*" in that amount (*m*).

An affidavit to hold to bail must not comprise two distinct causes of action at the suit of different plaintiffs (*n*), or two causes of action which cannot be joined in one action (*o*); otherwise the Court will discharge the defendant upon a common appearance, even although arrested for one of the causes of action only. But an affidavit to hold to bail on a penal statute may include several offences committed by the same defendant (*p*). So, an affidavit to hold to bail must not include several defendants who cannot be joined in one action (*q*); therefore, upon an affidavit that the maker and indorser of a promissory note are indebted to the plaintiff, neither can be holden to bail (*r*); even in a penal action, where several persons had separately incurred penalties, it was ruled that they could not be holden to bail in one affidavit (*s*); nor will the defect in these cases be waived, even by putting in bail (*t*).

The affidavit should correspond with the writ in the nature of the action, otherwise the defendant might be discharged on a common appearance, or the bail bond, if any, ordered to be delivered up to be cancelled; as if the affidavit be on a judgment and the writ in assumpsit (*u*).

Care should also be taken that the cause of action stated in the affidavit to hold to bail be that for which the plaintiff intends to declare; for if the declaration varies from the affidavit in the cause of action, the bail will be thereby discharged (*v*). And they would be so, if the declaration varies from the affidavit in the character in which the plaintiff sues, or the defendant is sued (*w*), or in the number of the plaintiffs or defendants (*x*), or in the name of the plaintiff (*y*), or even in the name of the defendant (*z*), unless, indeed, the bail have waived the objection, as by their entering into the bail piece by the name in which he is declared against.

*Negative of tender.*] Formerly, it must have been stated in the affidavit that no offer had been made to pay the sum therein sworn to, in notes of the Governor and Company of the Bank of England, ex-

(*l*) *Recks v. Groneman*, 2 Wils. 224.

(*m*) *Imlay v. Ellefson*, 2 East, 453; see Loft, 45.

(*n*) *Dean and Chapter of Exeter v. Seagell*, 6 T. R. 688.

(*o*) *Crooke v. Davis*, 5 Bur. 2690.

(*p*) *Holland v. Bothmar*, 4 T. R. 228.

(*q*) *Gilby v. Lockyer*, 1 Doug. 217;

*De la Preuve v. Duc de Biron*, 4 T. R. 697.

(*r*) *Hussey v. Wilson*, 5 T. R. 254.

(*s*) *Goodwin v. Parry*, 4 T. R. 577.

(*t*) *Hussey v. Wilson*, 5 T. R. 254; 4 Id. 577; Tidd, 9th ed. 188.

(*u*) See *Green v. Elgie*, 3 B. & Adol. 437, 1 Dowl. P. C. 344, S. C.

(*v*) *Tetherington v. Goulding*, 7 T. R. 80; *Wilks v. Adcock*, 8 T. R. 27.

(*w*) See per Lord Tenterden, C. J., *Marzetti v. Jouffroy*, 1 Dowl. P. C. 44; *Manesty v. Stevens*, 9 Bingh. 400; *Isley v. Isley*, 1 Dowl. P. C. 310, 2 C. & J. 330, S. C.; *Anon.* 1 Dowl. P. C. 87.

(*x*) *Spalding v. Mare*, 6 T. R. 363. See *Forbes v. Phillips*, 2 N. R. 98.

(*y*) *Grindall v. Smith*, 1 M. & P. 94.

(*z*) See *Clark v. Baker*, 13 East, 273, and see post, Chap. 4, s. 5, of this Book.

pressed to be payable upon demand; fractional parts of the sum of 20s. only excepted (a). But it is no longer necessary, and consequently not advisable, to negative this tender of the debt, the restrictions on cash payments under the several bank acts, passed in the reign of King George the Third, having, by the 59 G. 3, c. 49, s. 1, ceased on the 1st of May, 1823.

*Jurat.*] The *jurat*, if the affidavit be sworn before a commissioner, should state the place at which the affidavit is sworn (b); yet the Court of Common Pleas have ruled that an omission in this respect is no objection to the affidavit (c); and where no place was mentioned in the *jurat*, but the affidavit purported to be sworn before the chief justice of the King's Bench in Ireland, and to be signed by him, and the signature was verified here by affidavit, it was deemed sufficient to hold to bail under a Judge's order (d). If the affidavit be made by two or more persons, their names must be written in the *jurat*. (R. M. 37 G. 3, 7 T. R. 82). If taken by a commissioner of the Court, and made by a person who, from his signature, appears to be illiterate, such commissioner shall certify in the *jurat* that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same; and that the party wrote his signature in the presence of the commissioner<sup>s</sup>. (R. E. 31 G. 3, 4 T. R. 284) (e). By the *jurat* to an affidavit made by a foreigner, it was certified by the signer of the bills of Middlesex that the affidavit was interpreted by F. C. professor of languages (he having first sworn that he understood the English and French languages) to the defendant, who was afterwards sworn to the truth thereof; and this was holden to be sufficient (f). If made before a commissioner, it should state that he is a commissioner of the Court (g); although, perhaps, this would not be considered material, if the affidavit be intitled "In the King's Bench," and the commissioner be in fact a commissioner of that Court (h). In a late case, however, in the Common Pleas, it was held, that an affidavit of debt sworn before a commissioner in the country, without stating him in the *jurat* to be a commissioner, is insufficient, although intitled in the Court (i). We have already seen (*ante*, 82), that an affidavit not intitled in the Court, but purporting at the foot to have been sworn before "J. Y. deputy filacer," or at the "King's Bench Office, Inner Temple, before me, J. C.," has been deemed sufficient; and so it would be if sworn before a Judge of this Court. (See further, Vol. 2, 902).

If there be any interlineation or erasure in the *jurat*, the affidavit cannot be read or made any use of. (R. M. 37 G. 3). But an erasure over the *jurat* does not vitiate it (j).

(a) 37 G. 3, c. 91, s. 8; and see the other acts in Tidd's Pract. 9th ed. 187.

(b) *Res v. Justices West Riding of Yorkshire*, 3 M. & Sel. 493; MS. E. 1814. See the forms of *jurats*, Chit. Forms, 17.

(c) *Symmers v. Wason*, 1 B. & P. 105.

(d) *French v. Belléu*, 1 M. & Sel. 302.

(e) See 1 Chit. Rep. 660. See the form, Chit. Forms, 17.

(f) *Boac v. Solliers*, 4 B. & C. 358, 6 D. & Ry. 514, S. C.; and see *Marzetti*

*v. Joutfroy*, 1 Dowl. P. C. 41; and the form, Chit. Forms, 18.

(g) *Res v. Hare*, 13 East, 180; and see the form, Chit. Forms, 17.

(h) See *Res v. Kennet Canal Company*, 7 T. R. 451.

(i) *Howard v. Brown*, 1 M. & P. 22, 4 Bingh. 303, S. C.

(j) *Atkinson v. Thompson*, 2 Chit. Rep. 19; and see *Houlden v. Fassen*, 6 Bing. 236, 4 M. & P. 127, S. C.

[*By whom to be sworn.*] The affidavit may be made either by the plaintiff himself, or by one of several plaintiffs (*m*); or by any other person who can swear positively to the debt or cause of action; and if made by a third person, it is not necessary to state any connection between the deponent and the plaintiff (*n*). The person making it, however, it should seem, must not have been convicted of any infamous crime, which would render him incompetent as a witness (*o*).

[*Before whom to be sworn.*] The affidavit may be sworn before any Judge of the Court out of which the process shall issue; (12 G. 1, c. 29); or before a commissioner of such Court; (*Id.*); although such commissioner be concerned as attorney for the plaintiff. (*R. E.* 15 G. 2; *R. II.* 2 W. 4, r. 6). Or it may be sworn in Scotland or Ireland before a commissioner empowered to take affidavits under the recent act, 3 & 4 W. 4, c. 42, s. 42. (*Post*, Vol. 2, 904). Or it may be sworn before the officer who shall issue the process, or his deputy; (12 G. 1, c. 29); such deputy, however, must be appointed for issuing process, and not merely for taking affidavits (*p*). He must not be a deputy of a deputy (*q*). It should seem that to found an arrest on an *alias* or *pluries* writ of *capias*, if there have been already an affidavit sworn before the officer who issued the first, or any writ prior to that on which the defendant is arrested, it is not necessary that a fresh affidavit of debt should be made. (*Post*, 110) (*r*).

If made in England, it cannot be sworn before a magistrate, or any other person but those above specified. But an affidavit to hold to bail in this country may be sworn in any foreign country, either before a Judge or magistrate or other person authorized by the laws of the country to take affidavits; and upon this affidavit, if sufficient in other respects, a Judge of this Court will make an order to hold the defendant to bail (*s*). It has been made a question, but not decided, whether a British consul or vice-consul resident in a foreign country has authority by virtue of his office to administer an oath for the purpose of holding a defendant to bail in this country (*t*). The Court of Exchequer in this country have in several instances allowed an affidavit sworn before a commissioner of the Court of Exchequer in Ireland or a magistrate in Scotland to be read (*u*). If sworn before a Judge in Ireland or Scotland, the Judge's signature to the *jurat* must be verified by an affidavit to be made in this country; but if sworn before any other person (other perhaps than a commissioner empowered under the recent act of 3 & 4 W. 4, c. 42, s. 42, *post*, Vol. 2, 904), not only his signature to the *jurat*, but also his authority to administer oaths and

(*m*) *Swayne v. Crammond*, 4 T. R. 176.

(*n*) *Pieters v. Luytjes*, 1 B. & P. 1; *Andriani v. Morgan*, 4 Taunt. 231.

(*o*) *Nicholls v. Dallyhanty*, Barnes, 79; and see *Walker v. Kearney*, 2 Str. 1148; *Cowp.* 3; but see *Park v. Strockley*, 4 D. & R. 144; *Horsley v. Somers*, Barnes, 116; *Davis and Carter's case*, 2 Salk. 401; *Bland v. Drake*, 1 Chit. Rep. 165.

(*p*) *Rogers v. Jones*, 7 B. & C. 86.

(*q*) *Hughes v. Jones*, 1 B. & Adol. 388.

(*r*) *Baker v. Allen*, 7 B. & C. 526, 1 M. & R. 232, S. C.; and see *Plummer v. Woodburne*, 4 B. & C. 625, 7 D. & Ry.

25, S. C.; *Anderson v. Hayman*, 2 Moore, 192, 8 Taunt. 242, S. C.; *Evans v. Bidgood*, 4 Bingham. 63; *Dorville v. Whomwell*, 3 Bingham. 39, 10 Moore, 318, S. C.

(*s*) *Dalmer v. Barnard*, 7 T. R. 251; *Omenly v. Newell*, 8 East, 364; *Turnbull v. Mureton*, 1 Chit. Rep. 721.

(*t*) *Pickardo v. Machado*, 4 B. & C. 886, 7 D. & Ry. 478, S. C.; *Ex p. Lady Hutchinson*, 1 M. & P. 559, 4 Bingham. 606, S. C.

(*u*) *Killy v. Stanton*, 2 Y. & J. 75; *Ellis v. Sinclair*, 3 Y. & J. 273.

take affidavits, must be verified in like manner (x). An affidavit thus made abroad must contain all the requisites of an affidavit to hold to bail made in this country (y).

*When to be sworn, and duration of.]* Care should be taken that the affidavit be not sworn long before the process issues. Where the process did not issue for three years after the making of the affidavit, the Court discharged the defendant on entering a common appearance (z). Where the process issued soon after the making of the affidavit, although the defendant was not arrested for upwards of three years afterwards (several writs founded on the same affidavit having successively issued against him in the mean time), the Court of Common Pleas held the length of time which had elapsed between the swearing of the affidavit and the arrest, no objection, and refused to discharge the defendant on a common appearance (a). But this Court have recently ruled otherwise; and seem to think a year the extent of time during which an affidavit to hold to bail should be considered as in force (b).

#### 4. *In what Cases the Court will discharge the Defendant, and Consequences of Defect, &c. in Affidavit, &c.*

If the defendant be a privileged person at the time of the arrest, or for any other reason not subject to an arrest in the action, the Court or a Judge will in general discharge him, or, if he have given a bail bond, will order it to be delivered up to be cancelled, on his entering a common appearance in either case. (*See ante*, 64 to 78, and *post*, 113 to 118). So, if he become a peer or member of Parliament at any time pending the suit, the Court or a Judge will thus give him the full effect of his privilege (c). But where the question of privilege is doubtful, the defendant will not in general be thus relieved, but he will be left to his writ of privilege (d), or plea in abatement.

So, if the action be such that the defendant should not have been holden to bail in it, the Court or a Judge will discharge him, or, if he have given a bail bond, will order it to be delivered up to be cancelled, on his entering a common appearance in either case. (*See ante*, 78 to 82). And the Court or a Judge would so relieve the defendant, if he have been arrested without an affidavit to hold to bail being previously made, or without a Judge's order obtained when necessary, or if the sum sworn to be not indorsed on the writ (e), or if the affidavit to hold to bail be not filed with the proper officer (f). So, if the affida-

(x) *See French v. Bellur*, 1 M. & Sel. 302; *Omealy v. Newell*, 8 East, 364. *See* the form, Chit. Forms, 18.

(y) *Nesbitt v. Pym*, 7 T. R. 376, n.

(z) *Collier v. Hague*, 2 Str. 1270.

(a) MS. Trin. 1817.

(b) *Wallace v. Burn*, MS. M. 1024; and *Tenterden, C. J.*, has since ruled the same at chambers. *See Burt v. Owen*, 1 Dowl. P. C. 691.

(c) *Trinder v. Shirley*, 1 Dougl. 45.

*See Kernatt v. Norman*, 2 T. R. 300.

(d) *Luntley v. Battine*, 2 B. & Ald. 234; *see ante*, 65.

(e) 12 G. 1, c. 29, s. 2; and *see* the form of the *capias* and indorsement, 2 W. 4, c. 29, *post*, 96, 97, and *Chapman v. Ryall*, Barnes, 415; but *see Norden v. Horsley*, 2 Wils. 69; *Whitaker v. Wilder*, 1 Bur. 332.

(f) *Hussey v. Baskerville*, 2 Wils. 225. As to such filing, *see post*, 109.

vit materially differ from the process or declaration, the Court, or a Judge, will relieve him in the same way, and discharge the bail above if put in. (*Ante*, 90; and *see post*, 425, 426). But a variance between the affidavit and the cause of action cannot be taken advantage of before the declaration is filed (*g*); unless it be quite evident from the affidavit that the form of action stated in the writ must be wrong (*h*). So, the Court, or a Judge, will thus relieve the defendant, if the affidavit to hold to bail be defective in any material part. (*See ante*, 82 to 93).

The affidavit, if bad in part, is bad for the whole, and cannot be upheld as to the good part (*i*).

Where the defendant had voluntarily given a bail bond, without being arrested, the Court held that he had thereby waived all objections to the affidavit to hold to bail (*j*). Nor can the affidavit, unless an absolute nullity, be objected to, after the time for putting in bail has elapsed (*k*), and at all events not after bail has been perfected (*l*), or put in (*m*), or after time obtained to put it in (*n*), or after plea (*o*), or after judgment by default and notice of executing a writ of inquiry (*p*).

It should be observed that it is an invariable rule in this Court not to receive a counter affidavit, to contradict or do away the effect of an affidavit to hold to bail (*q*); nor, indeed, will they enter into an examination of the merits, but will take the facts of the case to be as sworn to in the original affidavit (*r*). In one case, however, where it appeared that the plaintiff, shortly before he made the affidavit to hold to bail, wrote a letter stating the defendant to be a creditor of his, the Court, upon application, interfered in a summary way to discharge the defendant out of custody, on an affidavit denying the debt, the plaintiff not having denied the writing of the letter, or alleged that the debt due to him had accrued subsequently to it (*s*). And in some other instances under very special circumstances, the Court have interfered, notwithstanding the affidavit to hold to bail was positive as to the existence of the debt (*t*). And if an affidavit merely state matter which shews that the defendant should not have been arrested at all for the same cause of action, or the like, the Court, or a Judge, will receive such counter affidavit (*q*).

(*g*) *Naylor v. Eagar*, 2 Y. & J. 90.

(*h*) *Green v. Elgie*, 3 B. & Adol. 437, 1 Dowl. P. C. 344, S. C.; *ante*, 90.

(*i*) *Kirk v. Almond*, 1 Dowl. P. C. 318, 2 C. & J. 354, S. C.; and MS. M. T. 1839; *Baker v. Wells*, 1 Dowl. P. C. 631, 1 C. & M. 238, S. C.

(*j*) *Norton v. Danvers*, 7 T. R. 375.

(*k*) *Tucker v. Colegate*, 1 Dowl. P. C. 874, 2 C. & J. 489, S. C.

(*l*) *Jones v. Price*, 1 East, 81; *Chapman v. Sinos*, 1 B. & P. 132. See *Robinson v. Nicholls*, 2 Str. 1077.

(*m*) *D'Argent v. Fleant*, 1 East, 330; *Shawman v. Whalley*, 6 Taunt. 185; *Dutton v. Barnes*, 1 M. & Sel. 230; *Reeves v. Hucker*, 2 C. & J. 44, S. C.

(*n*) *Moore v. Stockwell*, 6 B. & C. 76, 9 D. & R. 124, S. C.

(*o*) *Nesbitt v. Pym*, 7 T. R. 376, n.

(*p*) *Deaborough v. Coppinger*, 8 T. R. 77; and see generally, *Hussey v. Wilson*, 5 T. R. 254.

(*q*) *Imlay v. Ellefson*, 2 East, 453.

(*r*) *Kirk v. Strickland*, 2 Doug. 450; *Anon.* 1 Salk. 89, 100, 1 Ld. Rayn. 383, S. C.; *Slater v. Shergold*, 3 T. R. 572; and see *Armstrong v. Stratton*, 7 Taunt. 405, 1 Moore, 110, S. C.; *Burton v. Haworth*, 1 N. & M. 318, 4 B. & Adol. 462, S. C.

(*s*) *Nicetitch v. Bonacich*, 5 B. & Ald. 904; and see *Chambers v. Bernasconi*, 6 Bing. 498.

(*t*) See *Forrest*, 152; 3 East, 169; 2 Chit. Rep. 20; 13 Price, 8, M'Clel. 2, S. C.; 6 D. & Ry. 24; *Burton v. Haworth*, 1 N. & M. 318, 4 B. & Adol. 462, S. C.

On the other hand, the Court or a Judge will not receive a supplementary affidavit to supply any defect in an affidavit to hold to bail, (see *R. H. 2 W. 4, r. 9*) (*u*); although the Court of Common Pleas, in some instances, formerly received it (*w*).

In the Exchequer, a defendant is not permitted to object to the affidavit to hold to bail, without referring to it expressly by the rule *nisi*, so as to apprise the opposite party of the objection (*x*).



## SECT. 2.

### *The Writ of Capias, and Proceedings thereon before the Arrest.*

It has been already remarked (*ante*, p. 3), that a personal action might formerly have been commenced in this Court either by original writ, or by bill; or at the suit of attornies or other officers of the Court by attachment of privilege, &c. Now, however, the *only* process for the commencement of such action wherein it is intended to *arrest* and *hold a person to special bail*, (such person not being in the custody of the Marshal of the Marshalsea of this Court, or of the Warden of the Fleet Prison,) is a *writ of capias*. This is provided for by the statute 2 *W. 4, c. 39, ss. 4, 21*.

*In what cases, and by and against whom issued.*] This writ of *capias* may be issued, and is the means of commencing any personal action brought by *any* person against *any* person, whom it is intended to hold to bail, and who is not in the custody of the Marshal or of the Warden. Also in a personal action against several defendants, one or more of whom you cannot or do not intend to hold to bail, this writ may be issued and is the means of commencing the action against such defendant by serving a copy of it on him, as hereafter mentioned. And although the action be against such a defendant alone, such a service might, it should seem, be the means of commencing the action (*y*), though, in such a case, the more regular course would be to commence it by *writ of summons*, as pointed out in the Second Part of this Book. It may also be the means of commencing an action for the purpose of outlawing a party, as pointed out in the Second Chapter of the Fourth Book of this work.

*Form of the writ.*] The statute 2 *W. 4, c. 39, s. 4*, prescribes the form of this writ of *capias*, and by the 16th section enacts that in default of the defendant's putting in special bail or appearing, as the

(*u*) See *Cope v. Cook*, 2 Doug. 467; *Jacke v. Pemberton*, 5 T. R. 352; *Mulling v. Buckholtz*, 2 M. & S. 563.

(*w*) See *Hollis v. Brandon*, 1 B. & P. 36; *Green v. Redshaw*, Id. 227; *Mann v. Sheriff*, 2 Id. 357; *Machu v. Fraser*, 7

Taunt. 174; *Armstrong v. Stratton*, Id. 405.

(*x*) *Naylor v. Eagar*, 2 Y. & J. 99, 100.

(*y*) See the 2 *W. 4, c. 39, s. 4*, and the form of the warning, *post*, 97.

case may be, all such proceedings may be taken as are mentioned in the writ and warning therein. The following is the form:—

*William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, To the Sheriff of \_\_\_\_\_, [or To the Constable of Dover Castle, or To the Mayor and Bailiffs of Berwick-upon-Tweed, or as the case may be.] Greeting:—We command you, [or, if an alias, “as before we have commanded you,” or, if a pluries, “as often, we have commanded you”], that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of \_\_\_\_\_, if he shall be found in your bailiwick, and him safely keep until he shall have given you bail or made deposit with you according to law in an action on promises [or of debt, etc.], at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And We do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And We hereby require the said C. D. to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of King’s Bench to the said action, and that in default of his so doing such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon. And We do further command you the said Sheriff, that immediately after the execution hereof you do return this writ to our said Court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said Court or by any Judge thereof. Witness [name of Chief Justice], at Westminster, the \_\_\_\_\_ day of \_\_\_\_\_ [day of issuing the writ], in the \_\_\_\_\_ year of our reign.*

And, by the same act, the following memoranda must be subscribed to the writ—

N. B. *This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.*

#### *A Warning to the Defendant.*

1. *If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.*

2. *If a defendant, being arrested on this writ, shall have made a deposit of money according to the statute 7 & 8 G. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.*

3. *If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail bond.*

4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

The same statute also prescribes certain indorsements to be made on the writ; but as there are other statutes and rules of court, prescribing other indorsements, and as such indorsements form no part of the writ itself, they will be more conveniently and fully noticed hereafter, *post*, p. 106 to 109. If the writ be issued into a county palatine, the form of it, as prescribed by *R. M. 3 W. 4*, in some respects differs from the above (a).

The statute *imperatively* requires that the above form should be adopted; and any material variation from it would not only render it irregular, but, in some cases, absolutely void.

We shall now proceed to notice the particular parts and requisites of this writ, together with the memoranda and indorsements to be made thereon—the mode of suing it out—how it may be continued by subsequent writs of *capias*—and the consequences of any defect therein.

*Direction of writ.*] The writ may be directed to any sheriff or returning officer in England (b). It may also issue into Wales, and be directed to the sheriff of the county. (*1 W. 4, c. 70, s. 13*). It may issue into the counties palatine (c), and be directed in the manner hereunder mentioned. The writ is generally directed to the sheriff of the county wherein the defendant is to be found, and it cannot be executed in any other county than that to the sheriff of which it is directed. (*Post*, p. 119). If the sheriff be a party, the writ should be directed to the other sheriff, if there be two (d); or if there be but one, then to the coroners; and if the coroners also be parties, then to persons appointed by the Court, or nominated by the master, usually called elizors (e). If the sheriff be a party and the writ be directed to him, the Court will set aside the proceedings for the irregularity (f).

There are in many parts of England districts and places, parcel of some one county, but wholly situate within and surrounded by some other county; which was productive of inconvenience and delay in the service and execution of process; for remedying which, the late act of *2 W. 4, c. 39, s. 20*, enacts "That every such district and place shall and may, for the purpose of the service and execution of every writ and process, (whether mesne or judicial), issued out of either of the superior Courts at Westminster, be deemed and taken

(a) See the form, *Chit. Forms*, 41.

(b) *Price v. Jackson*, 1 M. & S. 442; see *Kelly v. Shaw*, 6 T. R. 74.

(c) *Chapman v. Maddison*, 2 Str. 1089; *Jackson v. Hunter*, 6 T. R. 73.

(d) *Letson v. Buckley*, 5 M. & S. 144.

(e) See *Mayor of Norwich v. Gill*, 1 Dowl. P. C. 246; 1 M. & Scott, 91, 8 Bligh. 27, 5 C.

(f) *Weston v. Coulson*, 1 W. Bl. 506. But this applies to bailable process only; and in the case of mere *servientile* process (when it was in all cases formerly directed to the sheriff) it might be so directed to him, notwithstanding he was a party. *Mayor of Kingston v. Budd*, 1 Dowl. P. C. 151.



to be part *as well* of the county wherein such district or place is so *situate* as aforesaid, *as of* the county whereof the same is *parcel*; and every such writ and process may be *directed* accordingly and *executed* in either of such counties" (g).

Where a writ is to be executed in a liberty or franchise within a county it must be directed to the sheriff of the county; but should (unless it contain a *non omittas* clause) be executed by the bailiff of the liberty to whom the sheriff directed his mandate for that purpose (5 G. 2, c. 27, s. 3); therefore a writ directed to the bailiff of the borough of Southwark was holden void and the defendant discharged out of custody (h). But the sheriff, and not the bailiff, must execute the writ within the liberty, if there be a clause of *non omittas* in the writ (i); or if even, without a *non omittas*, he arrest a defendant within the liberty, the arrest will be good, although the sheriff may thereby render himself liable to an action at the suit of the lord of the franchise (j). It will be seen that the new writ of *capias*, as prescribed by the 2 Will. 4, c. 39, always contains the *non omittas* clause, and the omission of it would render the writ irregular, (*sembl. R. M. 3 W. 4, reg. 10, post, 110*), and perhaps afford a ground for the sheriff's refusing to execute it.

There are certain cities and towns in England, which are counties of themselves, and to the sheriffs of which all writs must be directed which are to be executed within them. Some of these have two sheriffs, *viz.* the cities of Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich, and York, and the town of Nottingham; some only one, *viz.* the cities of Canterbury, Exeter, Lichfield, and Worcester, and the towns of Kingston-upon-Hull, Newcastle-upon-Tyne, Poole, and Southampton. In a late case it was held, that a writ directed to the "sheriff" of London is good, as the two sheriffs are but one officer (k).

The writ, as we have just seen, (*ante, p. 97*), may be issued into the counties palatine of Lancaster or Durham (l), but it must be directed, not to the sheriff of the county, but, in Lancaster, to the chancellor or his deputy; in Durham, to the bishop or his chancellor (m); who afterwards severally issue their mandate thereupon to the sheriff; and the sheriff executes the writ. This was the daily practice on the now abolished writs of *testatum capias*, or *latitat*, although it seems formerly to have been much doubted (n).

(g) See the form, Chlt. Forms, 39, n.b.

(h) *Booring v. Pritchard*, 14 East, 289; *Grant v. Bayge*, 3 East, 128; and see *Bradshaw v. Davis*, 1 Chlt. Rep. 374.

(i) *Currett v. Smallpage*, 9 East, 330.

(j) Gilb. C. B. 27; *Piggott v. Wilkes*, 3 B. & Ald. 542; *Bell v. Jacobs*, 1 M. & P. 309, 4 Bingh. 523, S. C.; *Sparks v. Spink*, 7 Taunt. 311.

(k) *Cutterbuck v. Wiseman*, 10 Law. J. 81. See as to Middlesex, Bac. Abr. Shff. K. 102, 2 Lord Raym. 1135.

(l) An original writ returnable in this court could not issue into such counties, there being no cursitors for them; nor could it be issued without a special

application to the Master of the Rolls for that purpose.

(m) R. M. 3 W. 4, reg. 16; see the form, Chlt. Forms, 41; see *Bracebridge v. Johnston*, 3 Moore, 237, 1 B. & B. 12, S. C.

(n) 2 Saund. 193-4, n. 2. It has, however, been held, that if a *capias* were directed in the first instance to the sheriff, he was bound to execute it; and a bail bond taken by him in such a case was holden valid, *Jackson v. Hunter*, 6 T. R. 71; and see *Nedham v. Bennett*, T. Raym. 171; *Chapman v. Maddison*, 2 Str. 1089; Andr. 191; R. T. 21 C. 1. *Sed quare* since the R. M. 3 W. 4, r. 16.

In Berwick-upon-Tweed, the process is directed to "the mayor and bailiffs of Berwick-upon-Tweed." It seems there is no ~~placer~~ for this place (o).

In the Cinque Ports, the writ must be directed to "the constable of Dover Castle," or to "the constable of the Castle of Dover or his deputy." In the franchise of Ely, the writ is directed to "the sheriff of Cambridgeshire," in the first instance, who thereupon issues his mandate to the bailiff of the franchise (p).

In any of these cases, if, when the writ should be directed to the sheriff, it be directed to any other person, it is *void*; and any arrest, &c. made under it, will be considered in the same light as if no writ whatever had issued. But if the writ be directed to the sheriff, when it should have been directed to some other person, the execution of the writ will be valid (*see ante*, 98, n. (n)); although perhaps the Court or a Judge would quash it for the irregularity.

*The parties' names.*] Great care should be taken that the parties' names be inserted correctly in the writ.

A misnomer of the *plaintiff* can, it seems, only be taken advantage of by pleading in abatement; and then only if the mistake be carried into the declaration (q); and it is settled, that though the plaintiff declare by a wrong Christian name, it is no ground of nonsuit at the trial, if it be shewn that the defendant knew that the action was brought by the person who actually sues (r).

In general, the affidavit must set forth the christian and surname of the *defendant* in full, and the adoption of initials or contractions will not suffice. But, by the recent act 3 & 4 W. 4, c. 42, s. 12, "in all actions upon *bills of exchange* or *promissory notes*, or other *written instruments*, any of the parties to which are designated by the initial letter or letters, or some contraction of the *christian* or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the *christian* or first name or names, instead of stating the christian or first name or names in full."

Also, in other cases, by the rule of *H. T. 2 W. 4, r. 32*, "a description of the defendant in the process or affidavit to hold to bail by *initials*, or by a *wrong name*, or *without a christian name*, shall be no ground for discharging the defendant out of custody, or for cancelling the bail bond, on motion for that purpose, if it shall appear to the Court that *due diligence has been used to obtain knowledge of the proper name*." In one case (s), due diligence was held to have been used in inquiring after the name of a defendant under the above rule, although no inquiries had been made of the defendant or his immediate friends, or at his house or place of business, the debt being large, and there being ground to fear he might abscond. If the case is not within the above statute or rule, and the defendant is arrested by initials, or by a wrong christian or surname, or without a christ-

(o) See *Mayor of Berwick, &c. v. Shanks*, 3 Bing. 461, 11 Moore, 372, S. C.

(p) *Grant v. Baggs*, 3 East, 128; see R. T. 13 G. 2.

(q) *Morley v. Law*, 2 B. & B. 34, 4 Moore, 369, S. C.; *Clerk of Taunton*

*Market v. Kimberley*, 2 Bla. Rep. 1120; and see 3 Anst. 935; *Jowett v. Char-nock*, 6 M. & Sel. 45.

(r) *Boughton v. Frere*, 3 Camp. 20.

(s) *Hicks v. Maroon*, 1 C. & M. 84.

tian name, the Court or a Judge will order him to be discharged out of custody, or the bail bond (if any) to be delivered up to be cancelled (*t*): unless the name be *idem sonans* (*u*); or unless the defendant have on several occasions gone by the name in which he is sued (*w*); or unless he waives the objection by executing the bail bond, or putting in bail above, in the manner presently noticed. The application for this purpose must be made or summons taken out before the time limited for pleading in abatement has expired (*x*), and before the defendant has put in bail (*y*); or, as it seems, before the time for putting it in has elapsed (*z*), or at all events before he obtains time to put it in (*a*). The Court will also set aside any proceedings founded upon such a writ (*b*); but not the writ itself (*c*); and on making the rule absolute, to discharge the defendant, or to cancel (*b*) the bail bond, the Court will, it seems, compel the defendant to enter a common appearance, and undertake not to bring any action against the sheriff, &c., as we shall presently see (*post*, 101), he might be otherwise liable to.

If the defendant sign the bail bond by the full name in which he is described (though improperly) in the writ, he will in general be precluded from getting his discharge out of custody, or cancelling the bail bond; but not if he sign it by his real name, describing himself also as sued by the wrong one. The defendants' having signed a regular bail bond, on a writ merely describing them as "Messrs. Llewellyn and Belchier," was held to have waived the irregularity in their description in the writ (*e*). But if a defendant be arrested by the initials of his christian name, and he execute the bail bond, even by his full name (*f*), or by the initials (*g*), the Court will, it seems, order it to be cancelled, unless the case be within the above statute or rule of Court. If, however, he put in bail above by his right name, the plaintiff may declare against him by such name, stating him to have been arrested by the other (*h*); or in such a case where

(*t*) *Smith v. Innes*, 4 M. & Sel. 360; *Reynolds v. Hankin*, 4 B. & Ald. 536; *Parker v. Bent*, 2 D. & Ry. 73; *M'Beath v. Chatterley*, Id. 237; *Wilks v. Lorch*, 2 Taunt. 381.

(*u*) *Abitul v. Beniditto* instead of *Benedetto*, 2 Taunt. 401; *Homan v. Tidmarsh*, 11 Moore, 231; *Dickinson v. Baines*, 16 East, 110; *Rex v. Shakespeare*, 10 East, 83.

(*w*) *Walker v. Willoughby*, 6 Taunt. 530; 2 Marsh. 230, S. C.; *Mestaer v. Herts*, 3 M. & Sel. 453; *Newton v. Maxwell*, 10 Law Journ. 78, 2 C. & J. 215, 1 Dowl. P. C. 315, S. C.

(*x*) *Hinsfield v. Marwell*, 15 East, 189; *R. H. 2 W. 4, r. 33*; and see *Smith v. Patten*, 6 Taunt. 115.

(*y*) *Murray v. Hubbard*, 1 B. & P. 647; and see *Clark v. Baker*, 13 East, 273; *Hale v. Finch*, 2 Will. 393.

(*z*) See *Tucker v. Colegate*, 1 Dowl. P. C. 574, 2 C. & J. 489, S. C.

(*a*) *Moore v. Stockwell*, 6 B. & C. 76, 9 D. & R. 124, S. C.

(*b*) *Smith v. Innes*, 4 M. & Sel. 360; *Ralph v. Peckham*, 6 B. & C. 164; *Sarjens v. Gordon*, 7 D. & R. 258.

(*c*) *Kitching v. Alder*, 1 Chlt. Rep.

282, Tidd, 448; *St. Hanlaire v. Byam*, 4 B. & C. 970, 7 D. & R. 458, S. C.; 3 Bingh. 206; *sed vide per Curiam* in *Rolph v. Peckham*, 6 B. & C. 164, 9 D. & R. 214, S. C.

(*e*) *Kingston v. Llewellyn*, 1 B. & B. 529, 4 Moore, 317, S. C.

(*f*) *Budd v. Graham*, K. B. H. T. 1821; *Taylor v. Rutherman*, 6 Moore, 264; *Lake v. Silk*, 3 Bing. 290, 11 Moore, 57, S. C.; *Grindall v. Smith*, 1 M. & P. 24.

(*g*) *Turner v. Colville*, MS. M. 1820, S. P.; *Reynolds v. Hankin*, 4 B. & Ald. 536; *Parker v. Bent*, 2 D. & R. 73; *M'Beath v. Chatterley*, Id. 237; *Ogden v. Barker*, 1 Dowl. P. C. 125; see *Kingston v. Llewellyn*, 4 Moore, 317, 1 B. & B. 529, S. C. But see *Howell v. Coleman*, 2 B. & P. 466, *contra*. The Court usually grant the application without allowing the defendant costs.

(*h*) *Murray v. Hubbard*, 1 B. & P. 645; *Symmers v. Wason*, Id. 105; *Hale v. Finch*, 2 Will. 393. Misnomer can be no longer pleaded in abatement, but the defendant may compel the plaintiff to amend the declaration, 3 & 4 W. 4, c. 2, s. 11; *post*, Vol. 2, 470

bail is put in in the right name, without at the same time stating the defendant to have been arrested by the name in the process, the plaintiff, it seems, may consider the bail as a nullity, and proceed against the sheriff, or on the bail bond accordingly (*i*). Even where the defendant has not estopped himself, by putting in bail, &c., the Court, instead of giving him advantage of the mistake in the process, have amended it, where the affidavit to hold to bail was against him by his right name (*k*). On the other hand, if the defendant put in bail by the name in the writ, he thereby estops himself from taking any advantage of the error, and the plaintiff may declare, and proceed to execution against him by such name, however erroneous (*l*).

If a defendant be arrested on mesne process by a wrong name, he may maintain an action of false imprisonment against the sheriff or his officers, or any one interfering in the arrest (*m*); but not so, if the defendant be as commonly known by the name by which he is sued as his real name (*n*), or if the name be *idem sonans* (see *ante*, p. 99, n. (*t*)): and where a person, before process sued out against him, being asked if his name were not John, said that it was, it was holden that he could not afterwards maintain trespass for an arrest in that name, although his name was really William (*o*). The Court, in discharging the defendant out of custody, &c. for a misnomer, usually restrain him from bringing any action.

The sheriff or his officer is not bound to execute mesne process wherein the defendant is described by the wrong name (*p*).

*The character in which plaintiff sues, or defendant is sued.*] It will be seen *ante*, p. 96, that the form of the writ, as given by the statute of 2 W. 4, c. 39, does not expressly require that the parties should describe themselves otherwise than generally; and it seems wholly unnecessary in this Court and in the Court of Exchequer, in any case, whether or not the plaintiff be suing or the defendant be sued in *autre droit*, (as executor, administrator, assignee, or the like) to describe him in the writ as suing or being sued in that character; and upon such a general description the plaintiff may, if he think fit, make the affidavit of debt (*q*), or declare in that character without discharging the bail, or otherwise prejudicing himself (*r*). Notwithstanding, however, the plaintiff should thus unnecessarily describe himself or the

(*i*) *R. v. Sheriff of Suffolk*, 4 Taunt. 818.

(*k*) *Stevenson v. Danvers*, 2 B. & P. 109. See *post*, Vol. 2, Book 4, Part 1, Chap. 28.

(*l*) *Smithson v. Smith*, Barnes, 94, Willes, 462, S. C.; *Stroud v. Gerrard*, 1 Salk. 8; *Meredith v. Hodges*, 2 N. R. 453.

(*m*) *Shadgett v. Clipson*, 8 East, 328; *Cole v. Hindson*, 6 T. R. 234.

(*n*) *Id.*

(*o*) *Price v. Harwood*, 3 Camp. 108; see *Walker v. Willoughby*, 6 Taunt. 530.

(*p*) *Morgans v. Bridges*, 1 B. & Ald. 647; *Keisar v. Tyrrel*, 2 Bulst. 256.

(*q*) *Isley v. Isley*, 3 Crom. & J. 330,

1 Dowl. P. C. 310, S. C.

(*r*) *Ashworth v. Ryall*, 1 B. & Adolph. 19; *Marzetti v. Joughroy*, 1 Dowl. P. C. 44; and see, as to nonballable process, *Weaver's Comp. v. Forrest*, 2 Stra. 1232; *Lloyd v. Williams*, 2 Bla. Rep. 722, 3 Wils. 141, S. C.; *Canning v. Davis*, 4 Burr. 2417, 1 Chit. Pl. 5th ed. 284. In the common Pleas, according to the late decision of *Manesty v. Stevens*, 9 Bingh. 400, the practice is different; and in that court, therefore, you should be cautious in correctly describing the character in which the plaintiff sues or defendant is sued. The principle and correctness of this decision seem very questionable.

defendant in a particular character, as if he style himself executor (provided he do not state himself to sue "as" executor, or the like) or give himself or the defendant any other superfluous description in the writ, and declare generally or in some other character, this would not be irregular or discharge the bail, because the demand is still the same (s). But if the writ be to answer the plaintiff in *autre droit*, as, if it describe him as suing "as" executor (t), or "as" assignee of a bankrupt (u), or if he sue *qui tam* (x), the declaration must be by him in the same character, or the bail will be discharged, and perhaps the declaration will be set aside.

*Number of the parties.]* The names of all the plaintiffs should be inserted in the writ, and no more. And by rule *M. T. 3 W. 4, reg. 1*, the writ must contain the names of all the defendants, if more than one, in the action, and must not contain the name or names of any defendant in more actions than one. If a bailable writ be at the suit of one plaintiff only and the declaration at the suit of two (y), or be against two defendants and the declaration against one only, the Court will order an *exoneretur* to be entered on the bail-piece, or discharge the defendant out of custody, and perhaps set aside the proceedings for irregularity (z), even although the other defendant be out of the jurisdiction of the Court (a). But this rule as to declaring against only one or more of several defendants named in the writ is not applicable to actions for *torts*, in which, though the plaintiff sue out bailable process jointly against several, he may declare separately against one or more of them (b), provided he drop his proceedings entirely against the others (c). Where a husband and his wife were arrested, and the latter was discharged out of custody on entering a common appearance, and the plaintiff declared against the husband alone, the Court held the proceedings irregular (d).

The insertion in the writ of the nominal defendant Richard Roe, as was formerly the practice in a bill of Middlesex and *latitat* against one defendant only, should now be avoided.

We shall presently (*post*, p. 121) see that in an action against several defendants, and wherein the plaintiff cannot or does not intend to arrest a particular one or more of them, a copy of this writ may be served on him by the sheriff, &c. and will have the same effect as a nonbailable writ.

(s) *Lloyd v. Williams*, 2 Bla. Rep. 722, 1 B. & P. 383, n. b, and *Anon.* 1 Dowl. P. C. 97; *Watson v. Pilling*, 6 Moore, 66, 3 B. & B. 4, S. C.

(t) *Murrell v. Jowatt*, MS. M. 1623; *Ashworth v. Ryan*, 1 B. & Adolph. 19; *Delcey v. Strange*, 6 T. R. 158; *Attwood v. Rattenbury*, 5 Moore, 209; *Douglas v. Irlam*, 8 T. R. 416; *Hally v. Tipping*, 3 Wils. 61.

(u) *Id.* and 1 Tidd, 9th ed. 450, n. (e).  
(x) *Id.* and *Canning v. Davis*, 4 Burr. 2417.

(y) *Rogers v. Jenkins*, 1 B. & P. 363.

(z) *Levin v. Smith*, 4 East, 589; *Moss*

*v. Birch*, 5 T. R. 722; *Holland v. Johnson*, 4 T. R. 695; *Holland v. Richards*, *Id.* 697; *Chapman v. Eland*, 2 N. R. 82, in which case the defendant had taken the declaration out of the office; *Yonge v. Murray*, 1 Marsh. 374; but see *Forbes v. Phillips*, 2 New Rep. 98; *Kervel v. Fossett*, 7 Taunt. 458.

(a) *Thompson v. Cotter*, 1 M. & S. 55.  
(b) *Wilson v. Edwards*, 3 B. & Cres. 734, 5 D. & R. 622, S. C.

(c) *Evans v. Whitehead*, 2 Man. & Ry. 367.

(d) *Cattarne v. Player*, 3 D. & Ry. 247.

*Addition and place of abode of the parties.]* In proceedings by *original* writ in personal and other actions, the *præcipe* must have stated, and when that process is adopted (as it is in real actions, &c.) must still state, the *defendant's* addition of estate or degree, such as *baronet*, knight, clerk, esquire, gentleman, yeoman, labourer, spinster, widow, &c.; or of his mystery, as merchant, tailor, carpenter, &c. (*See* 1 H. 5, c. 5). Also, the name of the town, or hamlet, or place, and county, where the defendant resides or lately resided, must be mentioned. (*Id.*). All this, however, was never very essential, unless it was intended to proceed against the defendant to outlawry; (*but see* R. M. 15 C. 2, r. 4); nor was it necessary at any time to give an addition to the name of the *plaintiff*. As regards this statement of the defendant's addition and place of abode in the present writ of *capias*, it will be observed, in the form of such writ as prescribed *ante*, p. 96, that there is a space left after the *defendant's* name for the description of his *residence*: such residence, or supposed residence, or such other description of the defendant as can be given, should be inserted accordingly. It will also be seen (*post*, p. 108) that a late rule of Court orders an indorsement to be made on the writ, of the residence and addition of the defendant, or such other description of him as can be given; it should seem, however, that the necessity for this indorsement would be superseded by a proper description of the defendant being given in the writ itself. If this description be not given, or be improperly given in the writ, the sheriff, perhaps, would not be bound to execute it (*e*); and at all events the Court would not allow him to be prejudiced by it (*f*). In proceedings to outlawry such description may be essentially necessary: in other cases, however, the omission of it would not, it seems, be a ground for the defendant's setting aside the writ itself or the proceedings under it (*g*).

It is not necessary to give in the writ itself any description of the *plaintiff's* residence; such description, however, must (as will be seen *post*, p. 107), be given by an indorsement on the writ, when sued out by the plaintiff in person.

*Cause of action.]* It will be seen that the form of the writ of *capias*, as prescribed *ante*, p. 96, renders it necessary to describe in it concisely the cause of action, as "an action on promises," or "of debt," "covenant," "detinue," "on the case," "trover," or "trespass," as the case may be. If this be wholly omitted, the Court or a Judge would set aside the proceedings. (*See* R. M. 3 W. 4, r. 10) (*h*). The cause of action thus inserted must be the same as that which is intended to be stated in the declaration, for if there be any variance between the writ and declaration in this respect, the defendant would be dis-

(e) See *Kerrick v. Nunnery*, 1 Dowl. P. C. 58.

(f) See *Clarke v. Palmer*, 9 B. & Cres. 153, 4 M. & R. 141, S. C.

(g) *Id.*; *see* *vide* R. M. 3 W. 4, r. 10, *post*, 110.

(h) See the rule of H. T. 2 W. 4, r. 10, as to requiring a bail bond or recogni-

zance of bail, with a penalty or sum of 40*l.* only in such a case; and see *Munroe v. Howe*, 1 Chit. Rep. 171; *Mayfield v. Darison*, 10 B. & Cres. 223; but that rule is not, it seems, applicable to actions commenced by the process prescribed by the 2 W. 4, c. 39.

charged on a common appearance (*i*); and, it seems, the proceedings might be set aside (*j*). Also, if the writ and affidavit vary in the form of action, the bail would be discharged (*k*). But the Court would allow an amendment, either in the writ or declaration, for an omission or defect in the statement of the cause of action, though not so to the prejudice of the bail (*l*).

*Return of.*] Formerly, all writs for the commencement of personal actions must have been made returnable in *term*-time, original writs and the process thereon on a general return day (*m*), and bills of Middlesex and *latitats* on some day certain (*n*), otherwise they were deemed irregular (*o*). The latter writs might have been made returnable the very day they were sued out (*p*). Bills of Middlesex and *latitats*, as also the process on original writs, must also have been made returnable either in the same or the next term after that in which they were tested; for, if a term intervened between the *teste* and return, the writ was deemed void (*q*). If the writ were returnable on a *dies non*, it was considered altogether void (*r*).

Now, however, it will be seen, that the writ of *capias* does not specify any particular return day; but the defendant must, within eight days after the execution thereof on him (*i.e.* after the arrest), inclusive of the day of such execution, put in special bail (as pointed out *post*, 149 to 157), on whatever day the last of such eight days may happen to fall, whether in term or vacation. If, however, the last of such eight days falls on a Sunday, Christmas-day, or any day appointed for a public Fast or Thanksgiving, in either of such cases the following day is to be considered as the last of such eight days; and if the last of such eight days falls on any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day is to be considered as the last of such eight days; and if the writ be executed on any day between the 10th August and the 24th October, the bail may be put in by the defendant at the expiration of such eight days; but no declaration, or pleading after declaration, can be filed or delivered between the said 10th August and 24th October. (*See* 2 *W. 4, c. 39, s. 11*). It will be seen (*post*, *p.* 106), that the writ is in force only, and cannot be executed after, four calendar months from the day of its date, including such day.

The writ should require the defendant to put in bail "in our Court of King's Bench," as in the form prescribed, *ante*, *p.* 96. If, however, it required him to put it in "in our Court before us," or other-

(i) *See* R. II. 8 C. 1; *De la Cour v. Reat*, 2 H. Bl. 278; *Turning v. Jones*, 5 T. R. 402; *Tetherington v. Goulding*, 7 T. R. 300; *Thomson v. Macirone*, 4 D. & R. 619, 2 Saund. 72a, *post*. But see *Gent v. Abbott*, 8 Taunt. 304, 2 Moore, 301, S. C.

(j) *King v. Skeffington*, 25 Jan. 1833; *et vide* R. M. 3 W. 4, r. 10, *post*, 110.

(k) *Green v. Elgie*, 3 B. & Adol. 437.

(l) *See* *Hutchinson v. Slyde*, Chit. Prac. 2d, *post*, 111; and *post*, Vol. 2, Book 4, Part 1, Chap. 23.

(m) *See* *Iman v. Huish*, 2 N. R. 133. *Reubel v. Preston*, 5 East, 291.

(n) *Mills v. Bond*, 1 Str. 399; *Reubel v. Preston*, 5 East, 291.

(o) *See* *Id.*, and *Moore v. Stockwell*, 6 B. & Cres. 76, 9 D. & R. 124, S. C.

(p) *Orlade v. Davidson*, 4 T. R. 610.

(q) *Parsons v. Lloyd*, 3 Wils. 341, 2 H. Bl. 846, S. C.; *Willett v. Archer*, 1 M. & R. 317, &c.

(r) *Kewworthy v. Peppiat*, 4 B. & Ald. 280.

wise shewed that the Court of King's Bench was meant, it would, it seems, suffice (t).

The sheriff, as is required by the writ, must, immediately after the execution thereof, return it, together with the manner in which he executed it, and the day of the execution thereof; or if the same be not executed, then he must return it at the expiration of the four calendar months from its date, or sooner if required by an order of the Court or a Judge. The practice upon this, however, shall be considered hereafter, *post*, p. 131 to 135.

*Date and teste.*] The process upon an original writ (u) and by bill must have always been *tested* on some day in term, not being Sunday (x). If sued out in vacation it must have been tested as of the previous term, usually the last day of it, or it would have been void (y). Now, however, the writ of *capias*, (as also any *alias* or *pluries* writ issued on it), must be dated the very day it was issued, and this whether in term or vacation. (See 2 W. 4, c. 39, s. 12). If not dated at all, or if dated on a day different to the day on which it was issued, it would be irregular, (see R. M. 3 W. 4, reg. 10, *post*, p. 110), and might be set aside by the Court, or a Judge, if the application be made within the eight days' time for putting in bail, and before bail put in. It will be found most convenient in practice, as a general rule, to state the year of our Lord, and not the year of the king's reign; though either would do. If, by mistake, a wrong king's name be inserted, it is immaterial, provided the writ contain the name of the Chief Justice (or, if there be no chief, of the senior puisne Judge) of the Court (z). It seems immaterial whether the day and year be stated in words at length or in figures (a).

The writ must not be issued until there is a complete cause of action, otherwise there would, it should seem, be a defence in bar of the action; or defendant might plead in abatement, that the action was prematurely brought; or in a clear undisputed case, the Court would set aside the writ (b); and, if arrested, the defendant might, under circumstances, maintain an action for such arrest. Formerly, indeed, a bill of Middlesex or *latitat*, (both of which are now abolished), might generally have *issued* before any cause of action had accrued; for if the cause of action accrued at any time before the exhibiting of the bill, it was sufficient to maintain the action, such precept or writ being treated as merely for the purpose of bringing the defendant be-

(t) See Tidd, 9th ed. 150.

(u) An original writ may now, as formerly, bear *teste* either in term or vacation; Style, 402; but it must not bear *teste* before the cause of action have accrued. 2 Burr. 967. It must be tested in the King's name, at Westminster, or wherever the Chancery is holden. 3 Bla. Com. 274. Original writs, however, since the 2 W. 4, c. 39, are no longer (as already seen, *ante*, p. 3) the means of commencing personal actions, in general. See *post*, Vol. 2, as to

the proceedings in *Ejectment* and *Replevin*.

(x) *Hart v. Weston*, 5 Burr. 2586, 2 Bla. Rep. 683, S. C.

(y) See *Young v. Wilson*, 5 Taunt. 664; *Johnson v. Smith*, 2 Bur. 964.

(z) See *Elvyn v. Drummond*, 4 Bingh. 278, 12 Moore, 523, S. C.

(a) See *Butler v. Cohen*, 4 M. & S. 336; *Eyre v. Walsh*, 6 Taunt. 333; *see vide Grogan v. Lee*, 5 Taunt. 651.

(b) *Lamb v. Pegg*, 1 Dowl. P. C. 447; *Kerr v. Dick*, 2 Chit. Rep. 11.



fore the Court, and not as the commencement of the action (c). But the defendant could not have been arrested until there was a complete cause of action (d). Now, however, the present writ of *capias* must, in all cases, be deemed as the commencement of the action, and consequently can neither be issued, nor a *fortiori* executed, until the cause of action be complete.

The *capias*, *alias capias*, &c., must be tested in the name of the chief (or, if there be no chief, of the senior puisne) Judge (h). If not so, it would be irregular, (*See R. M. 3 W. 4, reg. 10, post, p. 110*), and might be set aside accordingly, upon an application made within the eight days limited for putting in bail, and before putting it in.

By 5 & 6 W. & M. c. 21, s. 4, and 9 & 10 W. 3, c. 25, s. 42, the officer who shall sign any writ or process to arrest a person before judgment, shall at the same time set down upon such writ or process the day and year of his signing the same.

*Duration of the writ.*] The writ remains in force only, and cannot be executed after four calendar months from the date of it, including the day of such date; but if it be not executed within that time, it may be continued by an *alias*, and if necessary by a *pluries* writ as presently mentioned. Though there be not eight days remaining of the four months when the writ is executed, the eight days to put in bail must be still reckoned as in other cases (i).

*Memoranda to be subscribed.*] The writ of *capias* must have the formal memoranda, noticed *ante*, p. 96, subscribed to it, otherwise the total omission thereof, or any material variance therefrom, would render the writ and proceedings thereon irregular, (*R. M. 3 W. 4, reg. 10, post, p. 111*); and the same might be set aside accordingly, on an application to the Court in term, or a Judge in vacation, within the eight days limited for the putting in bail, and before putting it in.

*Indorsements on.*] The writ of *capias* must be indorsed with several memoranda or notices.

1. In the first place, by the 12 G. 1, c. 29, s. 2, the sum specified in the affidavit to hold to bail must be indorsed on the back of the writ, and the sheriff must take bail for such sum and no more. This clause was considered only *directory*, and not to have avoided the process when the sum sworn to was not indorsed on it (j). But the form of the indorsement as prescribed by the 2 W. 4, c. 39, together with the wording of that act, shew that it is absolutely requisite there should be this indorsement; and if omitted, it would afford a ground for setting aside the writ as irregular, (*R. M. 3 W. 4, r. 10.*), or for discharging the defendant on a common appearance, or cancelling the bail bond if any

(c) *Rowls v. Gell*, Cowp. 451; *Johnson v. Smith*, 2 Burr. 950; *Ward v. Honeywood*, 1 Doug. 61; *Best v. Widding*, 7 T. R. 4.

(d) *Hanway v. Mervey*, 1 Ventr. 28; *Johnson v. Smith*, 2 Burr. 967; *Swancott v. Westgarth*, 4 East, 75; *Hall v. Obder*, 11 East, 118.

(h) 2 W. 4, c. 39, s. 12.

(i) 2 W. 4, c. 39, s. 10.

(j) *Whiskard v. Wilder*, 1 Burr. 330; *Evans v. Bidgood*, 4 Bingh. 63, 12 Moore, 236, S. C., *nom. Martin v. Bidgood*; *Wilcoron v. Nightingale*, in error, 4 Bingh. 501, 10 B. & Cress. 202, S. C.; *Sharpe v. Abbey*, 5 Bingh. 193, 2 M. & P. 312, S. C.

given, though it would not render the writ void. (*Id.*). If the affidavit state that the defendant was indebted in several sums, it will suffice to indorse the total of them (*k*). The form of this indorsement should be thus:—"Bail for £ by affidavit." Or, if the arrest be by a Judge's order, "Bail for £, by order of [naming the Judge making the order], dated the day of , [date of the order]. Though the indorsement was thus, "Bail for £40 and upwards," the Court held it sufficient, as the defendant would not be bound to give bail for more than 40*l.* (*l*).

2. Secondly, the writ must be indorsed with the *name and place of abode of the attorney* actually suing out the same; and if such attorney be not an attorney of the Court in which the writ is sued out, then also with the name and place of abode of the attorney of such Court in whose name the writ is taken out; but if no attorney be employed for that purpose, then with a memorandum expressing that the same has been sued out by the *plaintiff in person*, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be. (2 *W. 4, c. 39, s. 12*). Also, if the attorney suing out the writ sues out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country must be indorsed on the writ. (*R. M. 3 W. 4, r. 9*) (*m*). We have seen, (*ante*, 29), that the attorney whose name is indorsed on the writ must, after a demand in writing made on him, declare whether the writ was sued out by his authority, and also declare the name and place of abode of his client, if ordered; and that, if the writ be not issued by the attorney's authority, the defendant may be discharged. (2 *W. 4, c. 39, s. 17*). But an omission of this indorsement, or any deceptive description therein, will not render the writ void, though the Court or Judge would set aside the proceedings for irregularity, (*R. M. 3 W. 4, r. 10*), or discharge the defendant on a common appearance, or order the bail bond (if any) to be cancelled (*n*). The application should, in general, be made before the expiration of the eight days limited for putting in bail, and before putting it in. But, under circumstances, it might, perhaps, be made at a later time. The form of this indorsement will be thus:—"This writ was issued by E. F. of , (if sued out as agent for an attorney in the country, here say "as agent for G. H. of "), attorney for the plaintiff (or plaintiffs) within named." Or, if sued out by the plaintiff in person—"This writ was issued in person by the plaintiff within-named, who resides at , [mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.] If the attorney be one of a firm, it is best to indorse the name of the firm. A description of the attorney's abode, as of "Ely Place," is sufficient (*o*); so is a description "Gray's Inn, London" (*p*).

(*k*) *Evans v. Bidgood*, 4 Bing. 63, 12 Moore, 236, S. C.

(*l*) *Webb v. Lawrence*, 2 Dowl. P. C. 81.

(*m*) See *Shepherd v. Shum*, 2 C. & J. 633; *Miller v. Bowden*, 1 C. & J. 563.

(*n*) *Chapman v. Ryall*, Barnes, 415;

*Oppenheim v. Harrison*, 1 Bur. 20; *Williams v. Lewis*, 1 Chit. Rep. 611.

(*o*) *Englehart v. Edwards*, 6 Leg. Obs. 138.

(*p*) *Englehart v. yre*, 2 Dowl. P. C. 145.

By the 7 & 8 G. 4, c. 71, ss. 8, 9, in bailable process sued out by parties not being attornies, &c., in their own persons, the sheriff or other officer must not execute it, unless delivered by his attorney, or such attorney's clerk, or agent authorized by such attorney, in writing, and unless it be indorsed by such attorney, &c., with his name and place of abode; and all arrests contrary to such provision are void. It is presumed, however, that this provision is virtually repealed by the above enactment of the 2 W. 4, c. 39, s. 12, which requires the place of residence of such plaintiff so suing in person to be indorsed on the writ.

It was ordered by the rule of *H. T.* 2 & 3 G. 4 (*q*), that the plaintiff's attorney or agent must indorse on the writ the place of abode and addition of the *defendant*, or such other description of him as such attorney or agent may be able to give. And it has been held, that, if such indorsement was not made, the sheriff was not bound to execute the process, and this although at the time of receiving it he made no objection to the want of the indorsement (*r*). It is to be observed, however, that this rule was made before the 2 W. 4, c. 39, and that in the body of the writ itself, (*ante*, 96), as prescribed by that act, the place of abode of the defendant should be inserted; and if it be so, the Court would probably deem it unnecessary that there should be this indorsement also. At all events, the omission of it would not afford a ground for setting aside the writ, but could only operate as a ground for relieving the sheriff in some instances (*s*).

3. Thirdly, the writ and warrant must be indorsed with a statement of the *amount of the debt*, and with the amount of what the plaintiff or his attorney claims for the *costs* of the writ and arrest, and attendance to receive debt and costs, and with a statement, that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. (*R. M.* 3 W. 4, r. 5; *R. H.* 2 W. 4, r. 11). It may be here observed, that the defendant is at liberty, notwithstanding such payment, to have the costs taxed; and if more than one-sixth be disallowed, the plaintiff's attorney will have to pay the costs of taxation. This indorsement must be written or printed in the following form:—"The plaintiff claims £ for debt, and £ for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days from the arrest or service hereof, further proceedings will be stayed." It is to be observed, that this indorsement is requisite only where the action is for a *debt*, which, however, must generally be the case in a bailable action (*t*). It applies to process issued against attornies (*u*). If this indorsement be not made or be improperly made, the Court or a Judge would set aside the writ as irregular (*v*), or discharge the defendant on entering a common appearance, or order the bail bond (if any) to be cancelled, on an application made within the eight days limited for putting in bail, and

(*q*) 5 B. & Ald. 560.

(*r*) *Kenrick v. Nanney*, 1 Dowl. P. C. 58.

(*s*) See *Clarke v. Palmer*, 9 B. & C. 153.

(*t*) See *Curwin v. Moseley*, 1 Dowl.

P. C. 432.

(*u*) *Tomkins v. Chikote*, 2 Dowl. P. C. 187.

(*v*) *Ryley v. Boissomas*, 1 Dowl. P. C. 383.

before putting it in. But the omission of such indorsement would not render the writ *void*. (*R. M. 3 W. 4, r. 10*).

4. Fourthly, the sheriff, or officer, must indorse on the writ the true day of the execution thereof, whether by service or arrest. (*2 W. 4, c. 89, s. 4*). And such day of executing it must appear in his return to the writ (*w*), (*post*, 121): and he must make such indorsement within six days, at the least, after such execution thereof; otherwise he will be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the Court or a Judge may direct, (*R. M. 3 W. 4, r. 4*), or perhaps he may be liable to an action if any damage be sustained by the plaintiff in consequence of the neglect. The form of this indorsement, if the defendant be arrested, may be thus:—"C. D. was arrested by me, X. Y., by virtue of this writ, on the      day of      , 1833. X. Y." Or, if the defendant be only served with the writ, then thus:—"This writ was served by me, X. Y., on C. D. on the      day of      1833. X. Y."

*Practical directions as to suing out the writ.*] In order to sue out this writ of *capias*, prepare your affidavit to hold to bail, as directed *ante*, 82 to 92, and a *præcipe* (*x*) for the office; also get a blank writ of *capias*, (which may be had at the stationer's, or elsewhere), and fill it up according to the directions pointed out, *ante*, 96 to 106. Take them to the signer of the writs (*y*), who will sign the writ: and the affidavit (if not already sworn before a Judge or Commissioner of the Court, as *ante*, 92), may be sworn before him at the same time; pay him 2s. 6d. for signing, (*R. M. 3 W. 4, r. 2*), and 1s. for the affidavit, if sworn before him. Leave the affidavit and *præcipe* with him. Take the writ to the Seal Office, and get it sealed; pay 7d. (*R. M. 3 W. 4, r. 2*). Take care that it is indorsed with the indorsements, as directed *ante*, 106 to 108. Make a copy of it, including the memoranda and these indorsements, for the purpose of serving it on the defendant. (*2 W. 4, c. 39, s. 4*). If more than one defendant, make such a copy for each of them. Apply at the sheriff's office, and get a warrant thereon for the arrest directed to the sheriff's officer you intend employing for that purpose, and as noticed *post*, 111: pay 1s. for such warrant in Middlesex, London, Surrey, Sussex, or Kent; 2s. 6d. in any other county. Give the copy or copies of the writ and the warrant to the officer, who will thereupon arrest the defendant, and proceed as pointed out in the next Section of this Chapter, *post*, 111.

*How executed.*] As to this see the next Section of this Chapter.

*Alias and pluries writs, if the writ of capias be not executed.*] If the defendant, or, in the case of several defendants, if all be not arrested upon or served with a copy of the *capias* within four calendar months from the day of the date of it, including such day, you may sue out an *alias capias*, and four months after that a *pluries capias*. These

(*w*) See form of the *capias*, *ante*, 96.

(*x*) See a form, *Chit. Forms*, 38. The *præcipe* forms no part of the process; and a variance between it and the *capias* will not, in general, be material. *MS. 1814*. On the other hand, if the

*præcipe* be right, and the writ wrong, it would assist the plaintiff in procuring an amendment of the writ.

(*y*) And this though issued into Middlesex, see 3 & 4 *W. 4, c. 67, s. 1, ante*, 13.

writs, when issued into the same county as the first writ of *capias*, differ only in form from such first writ, in inserting, after the words "we command you," the words "as before," or, in the case of a *pluries*, "as often we have commanded you" (z); or when issued into a different county from the first writ of *capias*, they differ only in form, in inserting, after the words "we command you," the words "as heretofore we have commanded the sheriff of —, that you omit," &c. (a). *They are sued out and indorsed, &c. and a copy or copies are to be made of them in the same manner as the writ of capias, ante, 109; pay 2s. 6d. for signing, 7d. sealing. (R. M. 3 W. 4, r. 2).* They may, it should seem, be sued out, and dated accordingly, at any time after the expiration of the first or preceding writ, unless you intend to avail yourself of the writ in order to take the case out of the statute of limitations, when some particular proceedings must be adopted thereon, as noticed in the second volume of this work, Book 4, Part 1, Chap. 1. These writs should correspond strictly with the preceding writ; for if the writ of *capias*, for instance, be against the defendant by one Christian name, and the *alias* or *pluries* by another, the Court will, it seems, set aside the proceeding (b), if the application be made within the eight days limited for putting in bail, and before bail be put in. A fresh affidavit of debt is not requisite on suing out either of these writs. And where a defendant was arrested on a *capias* founded upon an affidavit, on which a *capias* had previously issued into another county, upon which nothing was done, it was held regular, and that the second *capias* need not be an *alias* (c).

*Defects in, how, and when taken advantage of.*] We have already seen in the preceding pages, 97 to *supra*, in what respects the writ may be defective. As regards the mode of taking advantage of such defect, or of a variance between the writ and the declaration, the defendant cannot take such advantage, either by plea in abatement, for the Court will not now grantoyer of the writ (d)—or by writ of error (e). But for a variance, omission, or a mistake in the name of the defendant, or in the number of the parties—in the cause of action—in the teste—in the indorsements, or the like, we have seen in the preceding pages, that the Court, or a Judge, will discharge the defendant out of custody, or order the bail bond (if any) to be delivered up to be cancelled, and a common appearance entered; and in some cases set aside the proceedings. And by the late rule of *M. T. 3 W. 4, r. 10*, if the plaintiff or his attorney omit to insert or indorse on any writ, or a copy thereof, any of the matters required by the *stat. 2 W. 4, c. 39*, to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular.

The application to set aside the proceedings must be made to the Court in term on a motion supported by affidavit, or to a Judge in vacation. The application, if for a defect in the writ, must be made, it should seem, within the eight days limited for the defendant's

(z) See the form, Chit. Forms, 42.

(a) *R. M. 3 W. 4, r. 7*, prescribes the form; see it, Chit. Forms, 43.

(b) See *Corbett v. Bates*, 3 T. R. 660.

(c) *Rodwell v. Chapman*, 1 Dowl. P.

C. 634, 1 C. & M. 70, S.C., and *ante*, 92.

(d) *Boats v. Edwards*, 1 Doug. 227; *Deshons v. Head*, 7 East, 383.

(e) See 1 Saund. 313a; *King v. Bishop of Carlisle*, Barnes, 9.

putting in bail or appearing. And if the writ be not absolutely *void*, (which can rarely be the case) any defect in it would in general be cured by defendant's putting in bail (x), or obtaining time to put it in (a), or by his appearance, or by his taking the declaration out of the office (b). If the application be made for a variance between the writ and declaration, it should be made within the four days limited for pleading in abatement.

*When amended.*] The Court may allow the writ to be amended for any defect in it, if there be any thing to amend by. The affidavit of debt, if correct, would be something to amend by; so would the *præcipe* (c). And even where there was nothing to amend by, the Court allowed the *capias* to be amended, by inserting the Christian names of the defendants, which had been omitted by mistake (d); and, in another case, by even altering the name of the defendant in the *capias* (e); and, in other cases, by striking out the name of a plaintiff or defendant (f). And an amendment will, it seems, be allowed to insert the name of another person as plaintiff or as defendant (g), unless at a late stage of the proceedings, and where the defendant will swear that he has been defending on account of the omission. But if the bail were to be prejudiced by any one of these amendments, perhaps the Court would not allow it without discharging them (ante, 103); nor would they, perhaps, allow it if the defendant has already brought an action for false imprisonment, for his arrest under the process (h). Nor will an amendment be allowed if the writ be wholly *void* (i). And although the Court will thus allow an amendment of the writ itself, they will not, it seems, allow an amendment of the copy of the service, for that is the act of the party over which the Court have no control, whereas the writ is the act of the Court (j).

### SECT. 3.

#### *The Arrest, and Proceedings thereon.*

*When you have sued out the writ of capias, as directed ante, 109, take it to the sheriff's office, and obtain a warrant (k) thereon for the arrest, directed to the sheriff's officer you intend employing to make such arrest. Pay 1s. for such warrant in Middlesex, London, Surrey, Sussex, or Kent; 2s. 6d. in any other county. Make one copy, or, if more than one defendant, as many copies of the writ and indorsements thereon*

(c) *Widdrington v. Charlton*, 1 Stra. 156; *Wilson v. Finch*, Barnes, 163; Id. 167, 415; *Fox v. Money*, 1 B. & P. 250; *Davis v. Owen*, Id. 344; ante, 99, 100.

(d) *Moore v. Stockwell*, 6 B. & C. 76, 9 D. & R. 124, S. C.

(e) *Caswall v. Martin*, 2 Stra. 1072; *Morgan v. Luckup*, C. T. Hardw. 242; *Marquand v. Mayor and Burgesses of Boston*, Barnes, 416.

(f) See *Green v. Rennett*, 1 T. R. 782; *Adams v. Luck*, 6 Moore, 113, 3 B. & B. 26, S. C.; *Walker v. Hawkey*, 1 Marsh. 399, 5 Taunt. 653, S. C.

(g) *Rutherford v. Mein*, 2 Smith, 392.

(h) *Carr v. Shavo*, 7 T. R. 299.

(i) *Fox v. Clifton*, 1 Chit. Pl. 14, n., 5th ed.

(j) *Baker, Assignee, &c. v. Neaver*, 1 C. & M. 112, 1 Dowl. P. C. 618, S. C.; *Brooke v. Coleman*, MS. T. T. 1833, C. P.; *Tadrum v. Tenant*, 1 B. & P. 481, n.; see *vide Blinn v. Pratt*, 1 Chit. Rep. 369; *Adams v. Anon*. Id. n.

(k) Tidd, 9th ed. 161.

(l) See *Kenworthy v. Peppiat*, 4 B. & Ald. 288.

(m) *Byfield v. Sheet*, 10 Bingh. 27.

(n) See a form, Chit. Forms, 46.

as there are defendants named therein; and deliver the same, together with the warrant, to the officer to whom the warrant is directed, and he will thereupon arrest the defendant or defendants, if found within the sheriff's bailiwick, and proceed thereon as directed by the *capias*. The sheriff himself might personally execute the writ, and so might his undersheriff without warrant (l), but this is rarely if ever done.

The sheriff, it seems, is not in strict law entitled to more than 20*d.* or his bailiff to more than 4*d.* for an arrest; and if either exact more, he is liable to a penalty of 40*l.* (23 *H.* 6, c. 10) (m). Yet the master allows in costs 10*s.* 6*d.* if the arrest be in town; and one guinea if in the country, besides 1*s.* per mile for conveying the defendant to gaol, if it be at any distance (n).

*The warrant, and bailiff appointed by.* The warrant is an order from the sheriff to his officer, to arrest the defendant, so that the sheriff may obey the order of the Court, as contained in the writ of *capias* (o). The person to whom this warrant is directed, is a bound bailiff, that is, a bailiff usually bound with sureties in an obligation for the due execution of his office (p). But it may be directed to a special bailiff, appointed by the sheriff for the particular occasion, and usually nominated by the plaintiff or his attorney (q). The sheriff is not, however, responsible for these special bailiffs' acts; nor can he be ruled to return a writ which has been executed by them (r): though, indeed, after the arrest is made, and the defendant is placed in the sheriff's custody, he is answerable for him (s). An infant cannot, it seems, be appointed a sheriff's bailiff (t). It is very questionable whether a sheriff's bailiff can appoint a deputy (u). If directed to two or more "jointly and severally," any one of them may make the arrest; but if directed to them jointly and not severally, all must be acting in the arrest, otherwise it will be illegal (v). So, if it be directed to A. B., and after it is issued A. B. insert the name of C. D. (x), or if the direction or any other part of it be left blank, and filled up after it is issued (y), the warrant will be void, and any arrest under it illegal.

The warrant states the cause of action, the sum for which the defendant is to be holden to bail, and at whose suit. Where an arrest took place on a warrant which required the defendant to answer "*A. B. and two others*," it was held that the warrant was good and the arrest legal, the defendant not having been misled by the warrant (z). The warrant must, it seems, state the day and year of the issuing of the pro-

(l) Dalton, 103.

(m) *Scott v. Marshal, Sheriff of Middlesex*, MS. Exchequer, 30th Nov. 1831; and see *Neuenham v. Lunn*, 5 Mod. 225; *Dow v. Parsons*, 1 Chit. Rep. 295, 2 B. & Ald. 568, S. C.

(n) See *Holdero v. Moore*, 3 T. R. 417; *White v. Haugh*, 2 Str. 1262; *Jaques v. Whitcomb*, 1 Esp. 361; *Martin v. Slade*, 2 New Rep. 59; *Martin v. Bell*, 6 M. & Sel. 220; *Turner v. Carpenter*, 2 C. & P. 118; *Tidd's Supplement*, 34, &c.

(o) See the form, Chit. Forms, 46.

(p) 1 Bla. Com. 346.

(q) *Hamilton v. Dalziel*, 2 W. Bla.

952; *Porter v. Viner*, 1 Chit. Rep. 618.

(r) *De Morand v. Dunkin*, 4 T. R. 154; *Beckford v. Webb*, 2 Esp. 591; *Hamilton v. Dalziel*, 2 W. Bla. 9 2; *Higgins v. M'Adam*, 3 Y. & J. 1, 14; 1 Chit. Rep. 614, n.; post, 132.

(s) *Taylor v. Richardson*, 8 T. R. 505.

(t) *Cuckson v. Winter*, 2 M. & R. 313.

(u) *Id.* 315; *Blatch v. Archer*, Cowp. 63.

(v) See *Boyd v. Durand*, 2 Taunt. 161; and see Co. Lit. 181. b.; post, 118.

(x) *Housin v. Barroux*, 6 T. R. 122.

(y) *Burnlem v. Fern*, 2 Wils. 47; ante, 15.

(z) *Williams v. Lewis*, 1 Chit. Rep. 611.

cess upon which it is founded, as set down on the process itself, (6 G. 1, c. 21, s. 54), and have indorsed upon it the name of the attorney who sued out the writ. (2 G. 2, c. 23, s. 22, and see 2 W. 4, c. 39, s. 12, *ante*, 107). An omission of this latter indorsement merely subjects the sheriff to a penalty of 5*l.* but does not avoid the warrant (a). The warrant must also have indorsed upon it the indorsement noticed *ante*, 108, stating the amount of the debt and costs, and that, if they be paid in four days after the arrest, further proceedings will be stayed. (R. H. 2 W. 4, r. 2).

The sheriff shall not make out the warrant, until he have the writ in his actual possession, under penalty of 10*l.*; (6 G. 1, c. 21, s. 53; and see R. M. 1654, s. 2, and *ante*, 15); nor shall the bailiff arrest the defendant until he have received the warrant (b); otherwise he will be subject to an action for false imprisonment (c), and the Court, or a Judge, will discharge the defendant out of custody, or order the bail bond (if any) to be delivered up to be cancelled (d).

*Who may be arrested under the warrant.*] The officer of the sheriff is authorized by the warrant to arrest the person against whom such warrant is granted. But he must, at his peril, take care that he arrest no other person but such as is described in the warrant; for if he arrest C. D. upon a warrant on mesne process against A. B., and C. D. was not commonly known by the name of A. B., we have seen *ante*, 101, that C. D. may maintain an action for false imprisonment against the sheriff, even although he be the person actually intended to have been arrested, but by mistake is misdescribed as A. B. in the writ and warrant. Also, if the defendant be privileged from arrest, in some cases it would be extremely dangerous for the sheriff to arrest him. If a bailable writ were to issue against a member of the royal family, or against a peer, peeress, or member of the house of commons, the sheriff, by executing it, would render himself liable to be committed by the house of lords or house of commons, respectively, for a breach of privilege. So, if the sheriff were to arrest an ambassador or his servant, not only the sheriff and his officer, but also the plaintiff at whose suit the process issued and his attorney, would be subject to fine, imprisonment, and corporal punishment, by stat. 7 Ann. c. 12. (See *ante*, p. 67). But in all other cases of permanent privilege, the sheriff may execute the writ, without any regard to the privilege of the defendant (e); and no action for false imprisonment can be maintained against him for doing so (f).

Privilege from arrest is either permanent or temporary. The permanent privilege has been already considered. (See *ante*, p. 64 to 78). As to the temporary privilege from arrest, the king may, by

(a) 12 G. 2, c. 13, s. 4; and see *Grice v. Allen*, Barnes, 414, 415; Pr. Reg. 440—442.

(b) 4 Bac. Abr. 452; *Green v. Jones*, 1 Saund. 295, n. 5.

(c) *Id.*

(d) *Hall v. Roche*, 8 T. R. 187.

(e) *Duncomb v. Church*, 1 Salk. 1; Co. Lit. 131; *Tarlton v. Fisher*, 2 Doug. 676; *Crossley v. Shaw*, 2 W. Bl. 1085.

(f) *Tarlton v. Fisher*, 2 Doug. 676; and see *Cameron v. Lightfoot*, 2 W. Bl. 1194; *Sherwood v. Benson*, 4 Taunt. 631.



his writ of protection, privilege any person in his service from arrest, during a year and a day (*g*); but at present he seldom, if ever, exercises his prerogative in this respect. If the sheriff, however, were to arrest a person thus protected, he would perhaps be punishable for the contempt. But in the other instances of temporary privilege, which shall now be noticed, the sheriff is not bound in any manner to respect them; but the only remedy the person arrested has, is by application to the Court in term, or to a Judge at chambers in vacation.

Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, attorneys, &c. are privileged from arrest, whilst going to, attending, and returning from Court (*h*). If a party be arrested whilst coming to Court for the purpose of attending his cause, the Judge at *Nisi Prius* will order him to be brought up by *habeas corpus*, and discharge him (*i*), or will order the officer who made the arrest to attend, to shew cause why the party should not be discharged (*j*), and will also put off the trial, if the party require it (*k*). Even where a plaintiff, attending from day to day at the sittings, in expectation of his cause being tried, was, while waiting at a coffee-house in the vicinity of the Court for that purpose, but before the actual day of trial, arrested, the Court, upon application, ordered him to be discharged (*l*). So, a witness enjoys the same privilege, *cundo, morando, et redeundo* (*m*), even although not *subpoena'd* (*n*). So, where a person attending to justify as bail, was arrested, the Court ordered him to be discharged (*o*). Barristers, whilst on circuit, or attending the Court on business in which they are engaged, also enjoy the same privilege (*p*). But this privilege from arrest does not extend to a defendant returning home after being discharged from legal custody (*q*).

This species of privilege is not confined to an attendance in the superior Courts, but has been holden to extend to the court for insolvent debtors (*r*), to the bankruptcy court (*s*), and to all inferior courts of law, such as the sessions, &c. (*t*), and to witnesses attending to the execution of a writ of inquiry before the sheriff (*u*); and by 53 G. 3, c. 17, s. 27, to witnesses attending before the Judge Advocate. Even when a cause has been referred under an order of *Nisi Prius*, it has been holden that all parties, witnesses, &c. attending before the arbitrator, are privileged in the same manner as if the

(*g*) Finch, L. 454; 3 Lev. 332.

(*h*) *Meekins v. Smith*, 1 H. Bl. 636; Peake, Ev. 202; see 2 Salk. 544.

(*i*) *Solomon v. Underhill*, 1 Camp. 229; *Ex p. Tillotson*, 1 Stark. 470.

(*j*) M.S. sittings after Trin. 1817.

(*k*) *Solomon v. Underhill*, 1 Camp. 229.

(*l*) *Childerston v. Barrett*, 11 East, 426.

(*m*) *Gilman v. Wright*, 1 Vent. 11.

(*n*) *Carr v. Mottram*, T. Raym. 100.

(*o*) See *Meekins v. Smith*, 1 H. Bl.

636.

(*p*) *Rimmer v. Green*, 1 M. & S. 638.

(*q*) *Meekins v. Smith*, 1 H. Bl. 636, ante, 63.

(*r*) M.S. H. T. 2 W. 4, 1832; *R. v. Pridmore*, 1 Tidd, 196, 9th ed.

(*s*) *Willingham v. Matthews*, 2 Marsh. 57, 6 Taunt. 356, S. C.

(*t*) *Solly v. Hills*, 8 Bingh. 106, 1 M. & Scott, 253, 1 Dowl. P. C. 257, S. C.

(*u*) Com. Dig. Privilege, A.

(*v*) *Walters v. Ross*, 4 Moore, 34.

cause were still before the Court (*w*). The application for the discharge of a defendant on the ground of his having been arrested while attending a writ of inquiry, must be made to the Court, or a Judge of it, and not to the sheriff. In one case, where a person was arrested whilst attending before the commissioners of bankrupt to prove a debt, this Court refused to discharge him (*x*); and it was decided that he should, in such a case, have applied to the Court of Chancery (*y*). In a later case, however, the Court of Common Pleas discharged a defendant out of custody, when he was arrested whilst returning from the court of commissioners of bankrupts, where he had been acting as petitioning creditor (*z*).

As to the duration of this privilege of parties, witnesses, &c.:—It has been already mentioned, that where a party, attending from day to day at the sittings, in expectation of his cause coming on, and whilst waiting at a coffee-house in the vicinity of the Court for that purpose, was arrested, the Court discharged him, although it was before the actual day of trial (*b*). So, if a party or witness should come to town or from abroad, for the purpose, *bonâ fide*, of attending a trial, the Court, it should seem, would afford him protection, although he had come before the time appointed for the trial (*c*). So, a convenient time should be allowed to parties, witnesses, &c., to return home, after the trial or hearing of the cause shall be over; and the privilege should be construed liberally (*d*). Thus, where a cause was tried at the assizes at Winchester on Friday in the afternoon, and one of the witnesses was arrested at seven o'clock on Saturday evening, as she was entering the stage coach which was to convey her to her residence at Portsmouth, the Court held that her privilege had not expired, and ordered her to be discharged (*e*). Also, where a defendant, after the rising of the Court, went with his attorney and witnesses to dinner at a tavern in New Palace Yard, and was arrested whilst at dinner; the Court held that his privilege *redeunde* had not expired, and accordingly discharged him (*f*).

Also, clergymen are privileged from arrest, while performing divine service, and while going to church for that purpose, and returning thence. (50 *Id.* 3, c. 5; 1 *R.* 2, c. 16). And by 9 *G.* 4, c. 31, s. 23, a party knowingly offending herein is declared guilty of misdemeanor. In a late case the Court discharged a clergyman arrested in his way to the altar, but refused to give him the costs of the application, it not appearing that the arrest was with the concurrence of the plaintiff or his attorney (*g*).

The permanent privilege of a bankrupt from arrest after having ob-

(w) *Spence v. Stuart*, 3 *East*, 40; *Arding v. Flower*, 8 *T. R.* 536; *Ravall v. Gurney*, 3 *B. & Ald.* 252, 1 *Chit. Rep.* 679, *S. C.* The arbitrator has no power of discharging the witness.

(x) *Kinder v. Williams*, 4 *T. R.* 377.

(y) See 1 *Atk.* 54.

(z) *Solby v. Hills*, 8 *Bingh.* 166, 1 *M. & Scott*, 263, 1 *Dowl. P. C.* 257, *S. C.*

(b) *Childerston v. Barrett*, 11 *East*,

439. *Ante*, 114.

(c) *Ex p. Tillotson*, 1 *Stark.* 470.

(d) See *Solby v. Hills*, *supra*, n. z.

(e) *Holiday v. Pitt*, *Gillb. Rep.* 308, 2 *Str.* 489, *S. C.*

(f) *Lightfoot v. Osmern*, 2 *W. Bl.* 1115; but see *Anon.* 1 *Smith*, 355.

(g) *Goddard v. Harris*, 7 *Bingh.* 220. 3 *M. & P.* 122, *S. C.*

tained his certificate, has been already considered (*ante*, 70). By *stat.* 6 G. 4, c. 16, s. 117, the bankrupt shall be free from arrest and imprisonment by any creditor in coming to surrender, and after such surrender during the forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall, after his surrender, be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any such officer shall detain any such bankrupt after he shall have shewn such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt for his own use the sum of five pounds for every day he shall detain such bankrupt, to be recovered by action of debt in any Court of record at Westminster, in the name of such bankrupt, with full costs of suit. This provision, which is the same as the fifth section of the repealed act, (5 G. 2, c. 30), extends to all arrests by creditors, whether for debts proveable under the commission or not (*h*); to arrests under attachments for the nonpayment of money (*i*); and even to arrests under extents at the suit of the crown (*k*). But it does not extend to a taking of the principal by his bail; for the bail are not creditors, and besides, in contemplation of law, he was in their custody from the moment they became bail (*l*). Nor does it extend to a retaking a prisoner for any escape, by the Marshal of the King's Bench prison, without an escape-warrant; what is said of a taking upon an escape warrant in the statute relating to a retaking by a creditor (*m*). And where a bankrupt is entitled to his discharge upon an arrest, he will be discharged also from all detainers lodged against him after it took place (*n*); but if in custody at the time he surrenders, it is otherwise (*o*). The act gives the bankrupt this privilege from arrest whilst going to surrender; and where a bankrupt, upon receiving the commissioners' summons, delivered up his keys and effects to the messenger, and promised to submit to the directions of the act, but was arrested at his house on the first day appointed for the surrender, the Lord Chancellor, upon petition, discharged him (*p*). So, where, on his way to surrender, he had deviated from the direct road, and was arrested during that deviation, still he was holden entitled to his privilege (*q*). But where the bankrupt came from Holland within the forty-two days, intending to surrender on the forty-second day, but finding the time had been enlarged, he deferred surrendering until the expiration of the enlarged

(*h*) *Darby v. Baugham*, 5 T. R. 209.

(*i*) *Re M'Williams*, 1 Sch. & Lef. 169; *Ex p. Parker*, 3 Ves. 554.

(*k*) *Ex p. Russell*, 1 Rose, 278, 19 Ves. 163; *Ex p. Temple*, 2 Rose, 22, 2 V. & B. 391.

(*l*) *Ex p. Gibbons*, 1 Atk. 238; and see *Ex p. Leigh*, 1 Glyn & J. 264.

(*m*) *Anderson v. Hampton*, 1 B. & Ald. 308; and see *Ex p. Johnson*, 14 Ves. 36.

(*n*) *Ex p. Hawkins*, 4 Ves. 691; *Ex p. Rose*, 1 Rose, 280.

(*o*) *Ex p. Goldie*, 2 Rose, 343, 1 Merivale, 176.

(*p*) *Ex p. De Fries, Davies*, 163.

(*q*) *Ogle's case*, 11 Ves. 556.

time, and in the meantime was arrested, the Court refused to discharge him, saying, that the privilege in this case, like that of witnesses attending a court, must be confined to a reasonable time *eundo et redeundo*, and must not be extended beyond it (r). The privilege also continues during the whole of the forty-second day, although the bankrupt may have passed his examination at an early hour on that day (s); and in the same manner it continues to the end of the day to which the examination is adjourned, if adjourned to a specific day (t); but if adjourned *sine die* (u), then it continues for such time only, not exceeding three calendar months, as the commissioners by indorsement on their summons shall appoint, (6 G. 4, c. 16, s. 118), or whilst the party is actually in attendance on the commissioners, or going or returning from the meeting (x). So, if after the expiration of the forty-two days the bankrupt obtain an order to enlarge the time for surrendering, he enjoys no privilege from arrest during the enlarged time (y), unless whilst in actual attendance at, or in going to or returning from the meeting (z). But a commitment of the bankrupt does not operate as an adjournment *sine die*, with a protection; and where the bankrupt, on the day appointed for his last examination, was committed by the commissioners for not answering to their satisfaction, a detainer lodged against him after a day fixed for his being brought up, was held legal (a). And the bankrupt derives this privilege from the statute, and not from the commissioners' certificate indorsed upon his summons (b). And therefore, where the commissioners adjourned the bankrupt's last examination, the bankrupt was holden to be privileged from arrest in the mean time, although the commissioners had neglected to indorse the adjournment upon his summons (c).

After the expiration of the time limited for a bankrupt's examination, and before he has obtained his certificate, if he be arrested, the Court will not discharge him (d), even although arrested at the suit of one of his assignees who had received several dividends under the commission (e), or at the suit of the petitioning creditor (f); his only remedy is by application to the Court of Chancery (g). The Court, however, in such a case, have suspended the rule to bring in the body, in order to give the defendant time to make such an application to the Chancellor for relief (h). The order of the Court of Chancery for the bankrupt's discharge is made upon the plaintiff in the first instance (i), and if he disobey it, it is then extended to the officer (k), and disobedience of it is punishable as a contempt (l).

(r) *Kenyon v. Solomon*, Cowp. 156.

(s) *Ex p. Donlevy*, 7 Ves. 317.

(t) *Simpson's case*, Buck, 424; and see *Davis v. Trotter*, 8 T. R. 476.

(u) See *Cloughton v. Leigh*, 2 D. & R. 831, 1 B. & C. 652; *Ex p. Woods*, 1 Glyn & J. 75.

(x) *Ex p. Ross*, 1 Rose, 260.

(y) *Anon.* 15 Ves. 1.

(z) *Ex p. Hawkins*, 4 Ves. 691.

(a) *Ex p. Wright*, 2 Glyn & J. 202.

(b) *Ex p. Leigh*, 1 Glyn & J. 264.

(c) *Price's case*, 3 V. & B. 23.

(d) *Hill v. Reeves*, 1 B. & P. 424; *Percy v. Powell*, 3 Id. 6; *Oliver v. Ames*, 8 T. R. 364.

(e) *Hill v. Reeves*, 1 B. & P. 424; *Oliver v. Ames*, 8 T. R. 364.

(f) *M<sup>r</sup> Master v. Kell*, 1 B. & P. 302.

(g) *Anon.* 1 Rose, 230; *Ex p. Boyne*, 1 V. & B. 316.

(h) *Oliver v. Ames*, 8 T. R. 365.

(i) *Anon.* 15 Ves. 1.

(k) *Ex p. Boyne*, 1 V. & B. 316.

(l) *Ex p. Kerney*, 1 Atk. 155; *Ex p. King*, 7 Ves. 312; *Ex p. Dison*, 8 Ves. 104.

But besides the privilege given by the statute, the bankrupt also enjoys, at common law, the same privilege that parties and witnesses do in all other cases; and therefore, where a bankrupt was arrested as he was returning from the hearing of his petition for leave to surrender, he was holden to be privileged and was discharged (m). So, where a bankrupt was attending a meeting of the commissioners to declare a dividend several years after his final examination, being directed verbally by the commissioners to do so, he was holden to be privileged *eundo, morando, et redeundo* (n).

If a person be within the walls of a prison, although not a prisoner, it seems he cannot be arrested whilst there in the ordinary way; the only mode of proceeding is by lodging a detainer against him (o).

We have already seen how far a party can be twice arrested for the same cause (*ante*, p. 75), and when a party can be detained in custody on a fresh process after being improperly arrested (*ante*, 77).

*By whom.*] The arrest is made, either by the sheriff or undersheriff, or by one or more of his officers, to whom he directs his warrant for that purpose. We have seen, that if it be directed to two or more, jointly and severally, any one of them can make the arrest; but when directed to several jointly and not severally, the arrest must be made by all, otherwise it will be illegal (p). It is not necessary, however, that the officer to whom the warrant is directed should be the person who actually makes the arrest, or even be within sight when the arrest is made; but he must be *acting* in the arrest; he cannot go upon another business or stay at home, and send a third person to make it (q).

The sheriff also, instead of directing his warrant to one of his officers, may, as we have seen (*ante*, 112), direct it to a special bailiff, that is, to a person specially appointed by the plaintiff or his attorney, for the purpose of executing the writ, who executes it accordingly.

When a writ is to be executed in a county palatine, the proper officer in the county, to whom the writ is directed, issues his mandate to the sheriff, and the arrest is made under the sheriff's warrant, as in ordinary cases. (*See ante*, 98).

Formerly, when the writ was to be executed within a liberty, and the writ did not contain a *non omittas* clause, the sheriff had to issue his mandate to the bailiff of the liberty, and he had to make the arrest. (5 G. 2, c. 27, s. 3). If the bailiff returned no answer to the mandate, the sheriff might, upon a *non omittas* writ, have entered the liberty and executed it (r); or a *non omittas* writ might be directed to the sheriff in the first instance (s), and the sheriff was bound to execute it, without issuing any mandate to the bailiff of the liberty; or if the

(m) *Ex p. Jackson*, 15 Ves. 116.

(n) *Arding v. Flower*, 3 Esp. 117; 6 T. R. 534; and see *Salby v. Hills*, 8 Bingh. 166, 1 M. & Scot. 253, 1 Dowl. P. C. 257, S. C.

(o) *Wilkinson v. Jacques*, 3 T. R. 392; *Rose v. Christfield*, 1 T. R. 592; and see

the 2 W. 4, c. 39, s. 8.

(p) *Boyd v. Durand*, 2 Taunt. 161, and see 2 M. & R. 316, a; *ante*, 112.

(q) *Blatch v. Archer*, Cowp. 65; and see *Cuckson v. Winter*, 2 M. & Ry. 315, c.

(r) See 5 Co. 92; Gilb. C. B. 29.

(s) *Carrett v. Smallpage*, 9 East, 330.

sheriff, without a clause of *non omittas* in the writ, arrested the defendant within the liberty, the arrest was good, although perhaps the sheriff thereby rendered himself liable to an action by the lord of the franchise (*t*). The same consequences of a non-insertion of this *non omittas* clause would still prevail; but now, as the forms of writs prescribed by the 2 W. 4, c. 39, ~~must~~ be used for the commencement of a personal action, and as such forms (*viz.* the writ of *capias* and *distingas*) always contain the *non omittas* clause, cases of the non-insertion of it in *mesne process*, and the consequences attendant thereon, can seldom if ever occur.

*When.*] The arrest may be made at any time within four calendar months from the date of the writ, including the date of the writ, and not afterwards (*u*). It may be made at any hour, even of the night (*x*). It must not, however, be made on a Sunday, or it will be illegal (*y*); but bail may take their principal on a Sunday (*z*); or, after a negligent escape, the defendant may be retaken on a Sunday (*a*). We have seen (*ante*, p. 113), that if the bailiff make an arrest before the writ comes to the sheriff's hands, or before the warrant is made on it, the bailiff is a trespasser.

*Where.*] The arrest may be made at any place within the county, city, &c., to the sheriff of which the writ is directed. If the party be arrested in any other county, &c. than that to the sheriff of which the writ is directed,—if, for instance, a defendant be arrested in London, upon a writ of *capias* directed to the sheriff of Middlesex, the Court, or a Judge, will discharge him, or order the bail bond (if any) to be delivered up to be cancelled, even although the arrest took place on the verge of the county of Middlesex, if there be no dispute as to the boundaries (*b*); and to set aside an arrest in a wrong county, the affidavit must state, or shew sufficiently, that the arrest did not take place on the borders of the county, and that there is no dispute as to boundaries (*c*). It cannot, however, be made in the king's presence, nor in the king's Courts of justice, whilst the king's justices are there sitting, nor within the verge of his royal palace (*d*), (that is, as to the palace of Westminster, from Charing Cross to Westminster Hall, 28 H. 8, c. 12), unless

(*t*) Gilb. C. B. 27; *Piggott v. Wilkes*, 3 B. & Ald. 502; *Bell v. Jacobs*, 1 M. & P. 309, 4 Bingh. 523, S. C.; *Sparks v. Spink*, 7 Taunt. 311.

(*u*) 2 W. 4, c. 39, s. 10. Before this act the arrest might have been made at any time before or on the return day of the writ. *Moore*, 701; *Ellis v. Jackson*, 1 Sid. 229; *Parrot v. Mumford*, Sheriff of Kent, 2 Esp. 585.

(*x*) 9 Co. 66; 2 Chit. 357.

(*y*) 29 C. 2, s. 7, s. 6; and see *Taylor v. Phillips*, 3 East, 155; *Loveridge v. Plaistow*, 2 H. Bl. 29.

(*z*) *Anon.* 6 Mod. 231.

(*a*) *Parker v. Moor*, 2 Salk. 626, 2 L. Raym. 1496, S. C.; and see *Fratherstonehaugh v. Atkinson*, Barnes, 373; *Atkinson v. Jameson*, 5 T. R. 25; *Anon. Willes*, 459, 460; *post*, 129.

(*b*) *Hammond v. Taylor*, 3 B. & Ald. 408; and see *Chase v. Joyce*, 4 M. & S. 414.

(*c*) *Webber v. Manning*, 1 Dowl. P. C. 24; *Storer v. Rayson*, 4 D. & Ry. 739; *Lloyd v. Smith*, 1 Dowl. P. C. 372.

(*d*) 3 Bl. Com. 280.

under process out of the Palace Court, or by leave of the Board of Green Cloth (*k*). The Court of Common Pleas, however, refused to discharge a defendant, arrested upon a *capias* within the verge, without such leave (*l*). The arrest cannot be made in the Tower (*m*).

*How.*] The arrest is usually made by actual seizure of the person; but any touching, however slight, of the defendant's person, is sufficient for this purpose; and where the officer laid hold of the defendant's hand, as he held it out of the window, it was deemed sufficient (*n*). But the manner of arrest is not confined to corporal seizure; where the officer entered the room in which the defendant was, and locked the door, telling him at the same time that he arrested him, the Court held it to be a good arrest (*o*). Mere words, however, such as telling a man you arrest him, or the like, cannot of themselves amount to an arrest (*p*); and if a sheriff's officer send his servant to a party to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and pay him for his trouble, and execute a bail bond, this is not an arrest (*q*).

The officer cannot break open an outer door or window to make an arrest; but after he has obtained peaceable admission at the outer door, he may break open an inner door, even if it be the door of a lodger (*r*). This, however, extends only to the dwelling-house of the defendant; for if he be in the house of a stranger, the sheriff, after demand and refusal of admission, may break open the outer door to arrest him (*s*). Or if, after a party is arrested, he escape into a house, the officer will be justified in breaking even the outer door to retake him (*t*).

The sheriff may, but it is not compulsory on him, raise the *posse comitatus* in order to execute mesne process (*u*).

*Copy of writ to be delivered to defendant.*] As many copies of the process, together with the memorandum or notice subscribed thereto and all indorsements thereon, as there may be persons intended to be arrested thereon or served therewith, must be delivered, together

(*k*) *R. v. Stobbs*, 3 T. R. 735, and see *Winter v. Miles*, 1 Camp. 475, 10 East, 578, S. C.

(*l*) *Sparks v. Spink*, 7 Taunt. 311, and see cases cited in note (*f*) *supra*.

(*m*) See *Batson v. McLean*, 2 Chit. Rep. 51; *Bell v. Jacobs*, 1 M. & P. 309.

(*n*) *Anon.* 1 Vent. 306, note; *Genner v. Sparkes*, 1 Salk. 79; and see *Homer v. Battyn*, B. N. P. 62; *Lloyd v. Sandilands*, 8 Taunt. 250.

(*o*) *Williams v. Jones*, Hardw. 301; and see *Arrowsmith v. Le Mesurier*, 2 New Rep. 211, 212; 1 Man. & Ry. 211, 215.

(*p*) *Genner v. Sparkes*, 1 Salk. 79, 6 Mod. 173, S. C.

(*q*) *Berry v. Adamson*, 2 C. & P. 503, 6 B. & Cres. 528, S. C.; *George v. Radford*, 1 M. & M. 244, 3 C. & P. 464, S. C.; and see *Small v. Gray*, 2 C. & P. 605; *Nicholl v. Darley*, 2 Y. & J. 399.

(*r*) *Lee v. Gansell*, Cowp. 1, 5 C. 91.

(*s*) *Foster*, 319, but see *Johnson v. Leigh*, 1 Marsh. 565, 6 Taunt. 246, S. C.

(*t*) *Anon.* 6 Mod. 105; *Lofft*, 390; and see *Lloyd v. Sandilands*, 8 Taunt. 250.

(*u*) *Noy*, 40; *Crompton v. Ward*, 1 Stra. 432.

with the process, to the sheriff, or other officer or person to whom the writ is directed, or who may have the execution and return of it. (*Ante*, 109). Such sheriff, officer, or person must, upon or forthwith after the arrest, deliver one such copy to every defendant arrested by him under the writ. (2 W. 4, c. 39, s. 4). The object of this enactment is to give the defendant information of the precise demand against him. The arrest is not complete unless this copy be delivered to the defendant; and, if not so delivered, the Court or a Judge would, it should seem, order him to be discharged out of custody; or, if he have given a bail bond, would order it to be delivered up to be cancelled. The application for this purpose should, however, be made in proper time, and before special bail be put in, or time obtained to put it in (y). The plaintiff's remedy, in such a case, would, it seems, be against the sheriff for negligence, if, indeed, he sustained any real damage in consequence of it. Of course the sheriff would not be so liable if the plaintiff had neglected to deliver the copy of the writ to him.

The Court will not allow an amendment of this copy (z).

[Where several defendants, and you do not intend arresting all.] If the writ be against several defendants, the plaintiff may order (a) the sheriff or officer to arrest only one or more of them, and serve a copy of the writ delivered to the sheriff or officer as above mentioned on one or more of the others, which order the sheriff or officer must obey accordingly, and such service will be of the same effect as the service of a writ of summons in non-bailable cases. (2 W. 4, c. 39, s. 4). The sheriff would, it should seem, be liable to the plaintiff, by action, for any real damage resulting from his negligence in not making this service.

[Indorsement on writ of the day of arrest or service.] The sheriff, or officer, or person to whom the writ is directed, or who has the execution and return thereof, must indorse on the writ the true day of the execution of it, whether by service or arrest. (2 W. 4, c. 39, s. 4). He must make such indorsement within six days at least after the execution of the writ, or, in default thereof, he will be liable, in a summary way, to make such compensation for any damage which may result from his neglect as the Court or a Judge may direct. (R. M. 3 W. 4, r. 4). And such day of executing the writ must appear in his return to it (b), though the Court have held that the omission of it would not subject him to an attachment (c).

[Detainer.] If, whilst the defendant is in custody, any other bailable writ be lodged with the same sheriff, at the suit of the same or of any other plaintiff, the officer in whose custody he is, is bound at his peril to detain him, until regularly discharged also from this second writ. The officer therefore always searches the sheriff's office, to see if there be any detainers lodged there against a person in his

(y) See the cases *ante*, 110.

(z) *Bisfield v. Street*, 10 Bingh. 27.

(a) See form of order, Chit. Forms, 47.

(b) See form of the copias, *ante*, 96; and of the return, Chit. Forms, 51.

(c) MS. K. B. H. T. 1833.



custody, before he discharges him. The process of detainer of a defendant in custody of the sheriff is the same as the process where he is at large, and the defendant must be served with the copy of the writ in the same way as pointed out *ante*, 121. If the first arrest were made without process, or upon void process, or after the process no longer remained in force, or whilst the defendant was privileged from arrest, or the like, the defendant cannot afterwards be detained by virtue of any other subsequent process, however regular (*d*); unless such subsequent process be at the suit of another plaintiff, and without collusion with the party who caused the first arrest (*e*).

*What done after the arrest, &c.*] As soon as the party is arrested, he is usually carried to the house of the officer who arrests him, or of some other officer of the sheriff within the county, city, &c. (*f*); where he may be confined until the eight days limited for the putting in special bail have expired, if not sooner lawfully discharged. As to what is to be done if the party be too ill to be removed, *see post*, 131. He must not be taken to gaol within 24 hours after the arrest, unless he refuse to go to a place of safe custody. (*Post*, 130). He is discharged either upon giving a bail bond to the sheriff,—or upon giving security to the plaintiff for his appearance,—or upon depositing with the sheriff the sum sworn to, and 10*l.* to answer costs, in pursuance of *stat.* 43 G. 3, c. 46,—or without any bail bond or security;—or he escapes, or is rescued, or is lodged in the prison of the county, &c. These several subjects shall be considered in the next Section.

#### SECT. 4.

#### *The Bail Bond, &c.*

1. *The Bail Bond*, 122 to 125.
2. *Security to the Plaintiff*, 125.
3. *Deposit with the Sheriff*, 126.
4. *Discharge of the Defendant without Bail Bond, &c.*, 127.
5. *Escape*, 128.
6. *Rescue*, 129.
7. *Lodging the Defendant in Prison*, 130.

#### 1. *The Bail Bond.*

*How taken.*] The officer in whose custody the defendant happens to be, or by whom he was arrested, upon being furnished with the names of two sureties, and having satisfied himself of their sufficiency,

(*d*) *Loveidge v. Plaistow*, 2 H. Bl. 29; 2 Anstr. 461; *Birch v. Proger*, 1 N. R. 131; *Davies v. Chippendale*, 2 B. & P. 289; *ante*, 77, but *see Howson v. Walker*, 2 W. Bl. 823.

(*e*) *Barclay v. Fader*, 2 B. & Ald. 743,

1 Chit. Rep. 579, S. C.; *Howson v. Walker*, 2 Bla. Rep. 823; *Davies v. Chippendale*, 2 B. & P. 289.

(*f*) *See Houlditch v. Brop*, 4 Taunt. 609; and *see further post*, 130.

will prepare the bond; and as soon as it is executed, and it is found upon search in the sheriff's office that there are no other detainers against the defendant, the officer will discharge him out of custody, upon being paid his fees, the costs of the bail bond, &c.

*In what cases.*] The sheriff is bound to discharge a defendant in his custody upon mesne process in a personal action, upon reasonable sureties of sufficient persons, having sufficient within the county, &c. to keep the defendant's day in such place as the writ requires (*f*); and if he refuse to accept a bail bond when tendered with sufficient sureties, he is liable to an action on the case for such refusal (*g*). The sureties, at least two of them if more than that number, must, it seems, be respectively worth the penalty of the bond in order to maintain such action (*h*). They must also have sufficient within the county where the arrest was made (*i*). As to the number of the sureties, see *post*, p. 125.

The sheriff may take a bail bond from a defendant without arresting him; and the bond in such a case will be valid within the statute, if otherwise unobjectionable (*k*).

*When to be executed.*] The bail bond must, it seems, be executed and taken on or before the eighth day limited by the process for putting in bail, or it will be void (*l*); and the bail, in an action against them on the bond, may, it seems, take advantage of this irregularity on *non est factum* (*m*). So, if the bond be executed before the condition is filled up, it will be void (*n*).

*For what sum.*] The sheriff shall take bail for the sum indorsed on the writ, and no more. (12 G. 1, c. 29, s. 2). As this, however, is merely directory to the sheriff, a mistake in the sum for which the bond is taken will not avoid it, if no intention to oppress the defendant appear (*o*); and in practice it is always taken in double the sum sworn to. Also it is to be observed that the bail are liable to satisfy the whole debt due to the plaintiff, to the full extent of the penalty of the bond, although it exceed the sum sworn to and costs (*p*).

*Form of the bond.*] The bond must be to the sheriff himself, by the name of his office, and upon condition written, that the defendant shall appear at the day contained in the writ, or warrant, and in such place as the writ or warrant shall require; (23 H. 6, c. 9, s. 7); otherwise it shall be void. (*Id.* s. 8) (*q*).

(*f*) 23 H. 6, c. 9, ss. 5, 7; see *Matson v. Booth*, 5 M. & S. 223.

(*g*) 2 Saund. 61 b, c.

(*h*) *Matson v. Booth*, 5 M. & S. 223.

(*i*) *Lovell v. Plomer*, 15 East, 320.

(*k*) *Taylor v. Clow*, 1 B. & Adolph. 223; *Watkins v. Parry*, 1 Str. 444; *Hailey v. Fitzgerald*, Id. 643.

(*l*) *Pullein v. Benson*, 1 L. Raym. 352.

(*m*) *Thompson v. Rock*, 4 M. & S. 338;

and see *Samuel v. Evans*, 2 T. R. 569; *Taylor v. Clow*, 1 B. & Adol. 223.

(*n*) *Powell v. Duff*, 3 Camp. 181.

(*o*) *Norden v. Horsley*, 2 Wils. 69; *Whiskard v. Wilder*, 1 Bur. 331, ante, 106.

(*p*) 2 Saund. 61 a; *Walker v. Carter*, 2 Bla. Rep. 816; *Mitchell v. Gibbons*, 1 H. Bla. 76.

(*q*) See *Cotton v. Wale*, Cro. El. 862. See the form, Chit. Forms, 48.

The security to the sheriff must be by *bond*; otherwise it is void (*r*). And this bond must be made to the sheriff himself, by the name of his office, or it will be void (*s*); therefore a bond to or agreement with the sheriff's officer (*t*), or a bond to the sheriff, but not by his name of office (*x*), is void, and the Court will not relieve the sheriff. It does not require a stamp. (6 *G.* 4, c. 41).

The condition of the bond must be for the defendant's appearance, at the day and in such place as by the writ is required, or it will be void (*y*). But if the condition state the place of appearance correctly in substance, although not formally so, it will be sufficient (*z*). The condition of the bond is now, of course, differently worded to what it was when the action was commenced by original writ, or bill, or *latitat*, &c. (*a*): but when those processes were in existence, where the bond omitted the words "*wheresoever, &c.*" (*b*), or, instead thereof, required the defendant's appearance before the King "*at Westminster*" (*c*), or, instead of the words "*before our lord the King at Westminster*," it had the words "*before the justices of the King's Bench at Westminster*" (*d*), the bond was holden sufficient, because the words used were sufficiently descriptive of the Court in which the party's appearance was required. But, where upon process out of the Common Pleas the bail bond required an appearance before his "*Majesty at Westminster*," and it did not otherwise appear that the action was in the Common Pleas, the bond was holden void; for the words used in it were descriptive of the Court of King's Bench and not of the Common Pleas (*e*). But the Court would have held otherwise, had it appeared from the whole tenour of the bond that it was for the defendant's appearance in the Common Pleas (*f*). If the bond misdescribe the cause of action mentioned in the writ, or omit any part of it (*g*), or omit to state at whose suit the defendant is to answer (*h*), as the statute does not require these to be inserted in the condition, they may be considered altogether as surplusage if inserted, and a defect in or omission of them will not avoid the bond. But if the bond be single, and without any condition, (37 *H.* 6, 1 *a.* pl. 7), or (which is the same) if the condition be impossible (*i*), or if it be conditioned for any thing but the appearance of the defendant (*k*), or if there be a variance between the bond and writ in the day of appearance (*l*), the bond will be void.

(*r*) 23 *H.* 6, c. 9, ss. 7, 8; 10 *Co.* 101.

(*s*) *Id.*

(*t*) *Rogers v. Reeves*, 1 *T. R.* 418; 10 *Co.* 100; *Fuller v. Prest*, 7 *T. R.* 109; *Sedgworth v. Spicer*, 4 *East*, 568; *Lewis v. Knight*, 8 *Bingh.* 271, 1 *M. & Scott*, 353, 1 *Dowl. P. C.* 261, *S. C.*; and see 7 *E.* 4, 5, pl. 15.

(*z*) *Rogers v. Reeves*, 1 *T. R.* 422; and see *Courtney v. Phelps*, 1 *Sld.* 300; *Symes v. Oakes*, 2 *Str.* 893.

(*y*) 23 *H.* 6, c. 9, s. 78; *Dy.* 118 *b*.

(*a*) *Large v. Attwood*, 1 *D. & Ry.* 557.

(*b*) See the form, *Chit. Forms*, 48.

(*c*) *Shuttleworth v. Pilkington*, 2 *Str.* 1155; *King v. Pippett*, 1 *T. R.* 240.

(*e*) *Jones v. Stordy*, 9 *East*, 55; but see *Marsh v. Blackford*, 1 *Chit. Rep.* 323.

(*d*) 2 *Saund.* 60 *b*; and see *Crofts v. Stockley*, 5 *Bingh.* 32, 2 *M. & P.* 81, 3 *C. & P.* 281, *S. C.*

(*e*) *Renalds v. Smith*, 6 *Taunt.* 551.

(*f*) *Crofts v. Stockley*, 5 *Bingh.* 32, 2 *M. & P.* 81, 3 *C. & P.* 281, *S. C.*

(*g*) 2 *Saund.* 60 *a, b*; *Owen v. Nail*, 6 *T. R.* 702, *R. & M. C. N. P.* 93.

(*h*) *Rench v. Britton*, 10 *Mod.* 327.

(*i*) 2 *Saund.* 60.

(*k*) *Dy.* 118 *b*; 10 *Co.* 101.

(*l*) *Semb.* see 1 *Saund.* 20; *Bennett v. Pilkins*, 1 *Lev.* 192; *Samuel v. Evans*, 2 *T. R.* 569; but see 2 *Saund.* 60 *a*.

The sheriff may take a bond with one surety only, if he think proper (*m*); and such bond will be valid, although the statute mentions "sureties" in the plural number. The sheriff, however, had better take more than one surety; it is, in fact, strictly his duty so to do: and on this account, where a sheriff took a bail bond with one surety only, and the plaintiff lost a trial, on an attachment regularly issued against him for not bringing in the body, the Court of Common Pleas ordered the bond, as well as the attachment, to stand as a security (*n*). He may take a bond with three or more sureties if he will (*o*). Also, the sheriff is not answerable to the plaintiff if the sureties be insufficient (*p*); for it is optional with the plaintiff whether he take an assignment of the bond or not. The bond also may, it seems, be valid, although the sum sworn to have not been indorsed on the writ, or even if there have been no affidavit to hold to bail (*q*), or if the bond be taken for more than double the sum sworn to (*r*).

If the bond be void, and bail be not put in and perfected in due time, the sheriff of course may be sued for the escape; and the Court in such a case will not relieve him, by allowing him afterwards to put in and perfect bail (*s*).

If the defendant have been arrested by a wrong name, he should enter into the bond by his right name, stating himself to have been arrested by the name in the writ, or else sign the bond by his initials; otherwise he might be precluded from pleading the misnomer in abatement, or getting his discharge, or the bail bond (if any) cancelled, on entering a common appearance (*t*).

## 2. Security to the Plaintiff.

The statute of Henry 6, already mentioned, relates to such bonds only as are given to the sheriff; and therefore bonds to the plaintiff, in a different form from that prescribed by the statute, have been holden valid (*u*). So any other contract or undertaking in writing, to the plaintiff, for the defendant's appearance, will be valid; and if such an undertaking be given by an attorney, (which is usual in practice), the Court will, in general, enforce it by attachment (*x*). The undertaking must, however, be to the plaintiff by name, or to his attorney for him, and not to the sheriff or his officer; otherwise the Court will not enforce it (*y*). An undertaking by a third person

(*m*) 10 Co. 101 *a*; 2 Saund. 61 *c*.

(*n*) *Re v. Sheriffs of London*, in *Lazarus v. Tanner*, 9 Moore, 422, 2 Bingh. 227, S. C.

(*o*) See *Matson v. Booth*, 5 M. & S. 223.

(*p*) 2 Saund. 61 *c*.

(*q*) *Whiskard v. Wilder*, 1 Bur. 330; *Evans v. Bidgood*, 4 Bingh. 63; *Wilcoron v. Nightingale*, 1d. 501, 10 B. & Cress. 202, S. C.; *Sharpe v. Abbey*, 2 M. & P. 312, 5 Bingh. 193, S. C.; *sed quære*, since the 2 W. 4, *c*. 39, and R. M. 3 W. 4, r. 10.

(*r*) *Norden v. Horsley*, 2 Wils. 69.

(*s*) *Fuller v. Prest*, 7 T. R. 109, post, 127.

(*t*) *Ante*, 100. *Sed quære* if he would in any case be so precluded, if he were in custody.

(*u*) *Hall v. Carter*, 2 Mod. 304, 305; 2 Saund. 60.

(*x*) 2 Saund. 60; *Rogers v. Reeves*, 1 T. R. 418, 422.

(*y*) *Sedgworth v. Spicer*, 4 East, 568; *Lewis v. Knight*, 8 Bingh. 271, 1 M. & Scott, 353, 1 Dowl. P. C. 261, S. C.

to sign a bail bond for the defendant, is not an undertaking within the Statute of Frauds (29 Car. 2, c. 3, s. 4), to answer for the debt, &c. of another, and need not be in writing (z).

### 3. *Deposit with the Sheriff* (a).

At common law, the sheriff would not be justified in discharging a defendant arrested by him, even upon receiving from him the amount of the debt sworn to, and costs (b). But now a defendant, when arrested, instead of giving a bail bond, may deposit with the sheriff, under-sheriff, or sheriff's officer, the amount of the sum indorsed upon the writ, together with 10*l.* to answer the costs which may have accrued to the time limited for the putting in special bail, and thereupon he shall be discharged out of custody. (43 G. 3, c. 46, s. 2). And it shall be presumed that money paid to the officer, upon an arrest, has been paid under this act, unless the contrary very fully appear (c).

The sheriff must, it seems, within the eight days inclusive after the arrest, pay into Court the sum so deposited with him; and if the defendant afterwards duly put in and perfect special bail [or render himself] (d), he may obtain the money back again upon motion. (43 G. 3, c. 46, s. 2) (e). *For this purpose give a brief to counsel, to move for a rule nisi, upon an affidavit stating the arrest, deposit, payment of it into Court, and that bail has been put in and perfected, or that the defendant has rendered, as the case may be* (f). *Draw up the rule* (g) *with the clerk of the rules, and serve a copy of it on the plaintiff's attorney: afterwards move to make the rule absolute, upon affidavit of service, and take the money out of Court in the usual way.* If a third person, and not the defendant, have deposited the money with the officer, the Court will order it to be paid back to such third person, upon bail being duly put in and perfected, or the defendant surrendered (h), and this though the defendant has become bankrupt (i).

If bail be not duly put in and perfected, [and the defendant have not rendered himself, *vide supra*,] then by order of the Court upon motion, the money so deposited and paid into Court shall be paid over to the plaintiff. (43 G. 3, c. 46, s. 2). *For this purpose, make an affidavit stating the arrest, deposit, payment of it into Court, and that bail has not been put in, or not perfected, as the case may be* (k); *and proceed in the manner above directed.* The application should not, it seems, be made, until the expiration of the day for perfecting

(z) *Jarmain v. Algar*, 2 C. & P. 249, R. & M. C. N. P. 348, S. C.

(a) As to depositing money in Court in lieu of special bail, see *post*, 180.

(b) See *Slackford v. Austen*, 14 East, 468; *Wooden v. Moxon*, 6 Taunt. 490.

(c) *Wain v. Bradbury*, 1 Smith, 127.

(d) *Chadwick v. Battye*, 3 M. & S. 283; *Harford v. Harris*, 4 Taunt. 669.

(e) See *Stewart v. Bracebridge*, 1 Chlt.

Rep. 529, 2 B. & Ald. 770, S. C.; *Hill v. Ching*, 7 Moore, 432, 1 Bingh. 103, S. C.

(f) See form of the affidavit, Chlt. Forms, 48.

(g) See the form, Chlt. Forms, 49.

(h) *Nunn v. Powell*, 1 Smith, 13.

(i) *Edelsten v. Adams*, 2 Moore, 610, 8 Taunt. 557, S. C.

(k) See the forms, Chlt. Forms, 50.

special bail (*l*). If the defendant does not perfect bail in time, the plaintiff will be allowed, on motion, to take the money out of Court, though the defendant has rendered himself since the time for putting in bail, if there be no affidavits of merits on his part (*m*). The Court, however, may grant time to put in and perfect bail, or render the defendant (*n*). In a case where the defendant, being arrested by a wrong name, paid the amount of the sum sworn to, and 10*l*. for costs to the sheriff, without prejudice, the Court would not allow the plaintiff to take it out of Court, although the defendant had not perfected bail (*o*). Where a defendant cannot be found, in order to serve him personally with this rule for taking out the money, the Court will allow the service to be good by leaving a copy of the rule at the defendant's last place of abode, and sticking it up in the office (*p*). The 10*l*. deposited as costs is to be subject to such deductions, as, upon taxation of plaintiff's costs, as well of the suit as of his application to the Court in this behalf, may be found reasonable. (43 *G. 3*, c. 46, s. 2). Neither the sheriff nor any other officer's poundage or fees can be deducted on an order for payment of this money out of Court (*q*).

When the money has been thus paid out of Court to the plaintiff, he may still enter a common appearance for the defendant, if he think fit, and so proceed in his action. (43 *G. 3*, c. 46, s. 2) (*r*).

#### 4. Discharge of the Defendant without Bail Bond, &c.

The sheriff or his officer may, if he will, discharge the defendant, without taking a bail bond or any other security for his appearance; and if he afterwards retake him before the time limited for his appearance (*s*), or, if after returning *cepi corpus*, and before the expiration of the rule to bring in the body, he put in and perfect bail, or render the defendant (*t*), he is not liable to any action for an escape or false return. But on the other hand, if the sheriff in such a case have not the defendant at the time limited for his appearance, (that is, if he have him not in actual custody) or do not put in and perfect bail, or render the defendant in due time, he will then be answerable in an action for an escape (*u*) (being an action which may be considered as standing on the same footing as a motion for an attachment, which will be hereafter noticed (*x*)); and the Court will not relieve him, by allowing him after action brought to put in and justify bail (*y*), or to render the defendant (*z*); nor even stay the plaintiff's proceedings

(*l*) See *Rowe v. Saffly*, 6 Bligh. 634, 4 M. & P. 464, S. C.

(*m*) *Newman v. Hodgson*, 2 B. & Adol. 422; *Parker v. Turner*, 2 Chit. Rep. 71.

(*n*) *Parker v. Turner*, 2 Chit. Rep. 71.

(*o*) *Cadby v. Parsons*, 5 Taunt. 623.

(*p*) *Peate v. Triscott*, 1 Chit. Rep. 675; *Bellairs v. Poultney*, 6 M. & S. 230, 1 Chit. Rep. 466, S. C.

(*q*) *Stewart v. Bracebridge*, 2 B. & Ald. 770, 1 Chit. Rep. 529, S. C.

(*r*) See *Clarke v. Yeates*, 3 B. & B. 273, 7 Moore, 83, S. C.

(*s*) See *Atkinson v. Matteson*, 2 T. R. 172; *Moses v. Norris*, 4 M. & S. 397.

(*t*) *Pariante v. Plumtree*, 2 B. & P. 3*l*.

(*u*) 2 Saund. 61 b; *Fuller v. Prest*, 7 T. R. 109; *How v. Lacy*, 1 Taunt. 119; *Birn v. Bond*, 6 Taunt. 554; see *Mendez v. Bridges*, 5 Id. 325.

(*x*) See *per Gibbs*, C. J., 2 Marsh. 262.

(*y*) *Fuller v. Prest*, 7 T. R. 109; *How v. Lacy*, 1 Taunt. 119; *Moses v. Norris*, 4 M. & S. 397; *Webb v. Matthew*, 1 B. & P. 225; see *Allingham v. Flower*, 2 Id. 246, *semb. cont.*; see *post*, p. 129, 148.

(*z*) *Burn v. Sheriff of Middlesex*, 2 Marsh. 261; *Brookhouse v. Sheriff of Derbyshire*, 5 B. & Cres. 244.

against him, upon payment of the sum sworn to and costs (a), or allow the defendant to enter a common appearance in the original action upon paying such sum and costs (b), if the plaintiff have any claim beyond that sum. The usual course, however, in such a case, is to refer it to the Master to see how much is actually due to the plaintiff for debt and costs, and, upon payment of the sum reported due, to stay the proceedings against the sheriff.

Before the recent alteration in the process for commencing actions, where the sheriff arrested A. B. on the 13th November, upon a writ returnable on the 15th, and suffered him to go at large without giving a bail bond, and afterwards returned *cepi corpus*, and bail above were put in on the 17th December, and the same day A. B. was rendered, but no notice of render was given until the 13th January, and an action for an escape was commenced on the 19th December, and no trial had been lost in the original action; the Court stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion (c). And the Court of Exchequer have refused to set aside an order for the allowance of bail obtained after action brought against the sheriff for his escape, though no bail bond had been taken, nor bail above put in in due time, where the defendant had been rendered on the day of the expiration of the rule to bring in the body (d).

The sheriff is bound to discharge a defendant without a bail bond, &c., upon receiving a written discharge from the plaintiff or his attorney (e). He may, however, still detain him for a reasonable time, until he have searched the office to see if there be any detainers against him (f). And it seems he may detain him for his fees, but the attorney cannot (g).

If the sheriff improperly discharge a defendant, without a bail bond, &c. and be obliged to pay the plaintiff the amount of his debt, neither he nor his officer can maintain any action against the defendant for the money so paid (h).

### 5. Escape.

An escape is either negligent or voluntary; negligent, where the party escapes without the consent of the sheriff or his officer; voluntary, where the sheriff or his officer permits him to go at large. After a voluntary escape, if the party were in custody under a writ of execution, the sheriff can never retake him, and would be liable to an action for false imprisonment if he did (i); but if he were in custody upon mesne process, the sheriff may retake him at any time before the time limited for his appearance has expired (k), but not

(a) *Rex v. Sheriffs of London*, 9 East, 316.

(b) *Stevenson v. Cameron*, 8 T. R. 29.

(c) *Brookhouse v. Sheriff of Derbyshire*, 5 B. & Cres. 244.

(d) *Morley v. Cole*, 1 Price, 103.

(e) See *Taylor v. Brander*, 1 Esp. 45; *Martin v. Francis*, 2 B. & Ald. 402.

(f) *Taylor v. Brander*, 1 Esp. 45.

(g) See *Wats. Sheriff*, 108; *Martin v. Francis*, 2 B. & Ald. 402.

(h) *Pitcher v. Bailey*, 8 East, 171.

(i) 1 Saund. 35; *Atkinson v. Jameson*, 5 T. R. 25.

(k) *Atkinson v. Matteson*, 2 T. R. 172, 176, 177.

after it (*l*). After a negligent escape, however, the sheriff may in all cases retake the party (*m*), even on a Sunday (*n*), or although he have been declared a bankrupt after his escape, and at the time of the retaking had the protection from arrest given him by the commissioners in pursuance of stat. 6 G. 4, c. 16, s. 117 (*o*).

In the case of an arrest upon mesne process, all that is required of the sheriff is to bring the body of the defendant into Court, on the day limited for the defendant's appearance (*p*); consequently an action for an escape, which we have just noticed, cannot be brought against him before that time. Nor is he liable to an action, if he put in and perfect bail for the defendant before the expiration of the rule to bring in the body (*q*); or even if an action be brought before bail is put in, putting in and perfecting bail afterwards and before trial will, it seems, be a bar to the action (*r*); and the only means the plaintiff has of preventing this, is by opposing the justification (*s*), or moving to set aside the rule of allowance (*t*). But the Court will grant an attachment against the sheriff for not obeying the rule or or order to bring in the body, notwithstanding bail have been put in and perfected before the attachment is moved for (*u*). And the Court will not, as we have seen (*ante*, pp. 127, 128), in general, allow the sheriff to render the defendant after action properly brought against the sheriff for an escape; and this, though he should not have been ruled to return the writ or bring in the body before action brought.

If, after a voluntary escape, the sheriff be obliged to pay the plaintiff the amount of his debt, neither the sheriff nor his officer can maintain any action against the defendant for the money thus paid (*x*).

If any person obstruct or prevent the sheriff or his officers from retaking the defendant after his escape, the Court, upon application and an affidavit of the facts, will grant an attachment against them, the same as in all other cases of obstructing the execution of the process of the Court.

### 6. Rescue.

If the defendant, after he is arrested, and before he is carried to prison, be rescued from the sheriff or his officer, the sheriff will be excused from having his body in Court at the return of the writ (*y*).

(*l*) See *Moses v. Norris*, 4 M. & S. 397.

(*m*) 1 Saund. 35.

(*n*) *Anon.* 6 Mod. 231, 95; and see *ante*, p. 119; *Featherstonehaugh v. Atkinson*, Barnes, 373; *Atkinson v. Jameson*, 5 T. R. 25.

(*o*) *Anderson v. Hampton*, 1 B. & Ald. 308; *ante*, p. 116.

(*p*) 1 Saund. 35 a.

(*q*) *Pariente v. Plumbtree*, 2 B. & P. 35.

(*r*) *Murray v. Durand*, 1 Esp. 87; *Altingham v. Flower*, 2 B. & P. 246; and see *Fairlie v. Birch*, 3 Camp. 397. When writs of mesne process were returnable only in term time, (as they were before the 2 W. 4, c. 39), this putting in and

perfecting bail would not have discharged the sheriff unless the bail were put in of the term in which the writ was returnable. See *Moses v. Norris*, 4 M. & S. 397; *Crow v. Watson*, 2 Chit. Rep. 93. It is questionable how they should be now put in, under the present writ of capias, to obtain such discharge.

(*s*) *Fuller v. Prest*, 7 T. R. 1051.

(*t*) *Murray v. Durand*, 1 Esp. 87.

(*u*) R. H. 3 W. 4, *Rez v. Sheriff of Middlesex*, 8 T. R. 30. See *post*, p. 136.

(*x*) *Pitcher v. Bailey*, 8 East, 171.

(*y*) Com. Dig. *Rescous*; and see *Rez v. Sheriff of Middlesex*, in *Williams v. Pennell*, 1 B. & Ald. 190, Holt, C. N. P. 539, n., S. C.



But a rescue after the defendant has been carried to prison, even where the sheriff is bringing him from the prison to the Court by *habeas corpus*, will not excuse the sheriff, but he is answerable for it as an escape (*x*). And an escape, owing to the negligence of the officer, will not justify the return of a rescue (*a*).

If the sheriff return the rescue, the offenders may be punished by attachment (*b*); or by indictment; and by a special action on the case against them by the plaintiff for damages, whether the rescue be returned or not (*c*). And upon the sheriff's returning a rescue, the Court upon application will grant an attachment against the offenders in the first instance (*d*); for the sheriff's return being in nature of a conviction, and not traversable, and the only remedy for the party in such a case being by action against the sheriff for his false return (*e*), it would be useless to grant a rule *nisi*. For the same reason, the Court will proceed to punish the offenders without having them examined on interrogatories (*f*). But the Court have permitted a defendant to shew, by affidavit, in mitigation of punishment, that in fact there had been no legal arrest (*g*).

Formerly, the punishment on an attachment for a rescue was a fine of four nobles; but latterly the Courts have fined the parties according to the circumstances of each case (*h*).

### 7. Lodging the Defendant in Prison.

A sheriff's officer, having arrested a defendant upon mesne process, shall not carry him to gaol within 24 hours from the time of such arrest, under penalty of 50*l*.; unless the defendant refuse to be carried in the meantime to some safe and convenient dwelling-house in the county, to be named by him, not being his own house. (32 *G.* 2, c. 28, ss. 2, 12). It is the duty of the officer to request of the defendant to name such house, before he can take him to gaol, within the 24 hours (*i*).

The officer may confine the defendant in custody in a private house (*k*); the defendant, however, is usually confined in the house of the officer who arrests him, or of some other officer within the same bailiwick, until the expiration of the eight days limited for defendant's putting in bail (*l*). But the officer may, if he think fit, lodge him in the gaol of the sheriff, at any time after the expiration of 24 hours from the time of arrest; and he should do so before or on the eighth day for defendant's putting in bail, or as soon afterwards as possible; for after that time the sheriff keeps him at his peril, in case the creditor is thereby delayed or prejudiced (*m*).

(c) *O'Neil v. Marson*, 5 Bur. 2812.

(a) *Hill v. Leigh*, Holt, C. N. P. 537; *Fernor v. Phillips*, 5 Moore, 184, (b), 3 B. & B. 27, (a), S. C.

(b) *Sheather v. Holt*, 1 Str. 531; *Rex v. Belt*, 2 Salk. 586.

(c) Com. Dig. Rescous; *R. v. Omer*, 5 East, 304.

(d) *Anon.* Say. 121; *Rex v. Elkins*, 4 Bur. 2129.

(e) *Rex v. Pember*, Hardw. 112.

(f) *Rex v. Elkins*, 4 Bur. 2129; but see *Rex v. Horsley*, 5 T. R. 362.

(g) *Rex v. Minify*, 1 Str. 642.

(h) *Rex v. Minify*, 1 Str. 642; *Rex v. Elkins*, 4 Bur. 2129.

(i) *Dewhurst v. Pearson*, Exch. 29th Jan. 1833; and *Simpson v. Renton*, K.B. MS. overruling *Pitt v. Sheriff of Middlesex*, 1 Dowl. P. C. 201, 4 M. & P. 726, S. C.

(k) *Stevens v. Jackson*, 6 Taunt. 106, 1 Marsh. 469, S. C.; *Baker v. Davenport*, 8 D. & R. 606.

(l) See *Houlditch v. Birch*, 4 Taunt. 608.

(m) *Planck v. Anderson*, 5 T. R. 37, 41; see also *Brandling v. Kent*, 1 T. R. 60.

If the defendant be too ill for removal from his lodging, the sheriff or officer should not remove him, and may suffer him to remain there, but must take care that he do not escape, or else have him in custody at the return of the writ, unless at that time he continue too ill to be removed (n).

SECT. 5.

*Proceedings against the Sheriff.*

1. *Rule or Order to return the Writ*, 131 to 135.
2. *Rule or Order to bring in the Body*, 135 to 137.
3. *The Attachment*, 137.

1. *Rule or Order to return the Writ.*

It should be premised that the writ of *capias* should regularly be returned by the sheriff, &c. immediately after the execution thereof; or, if the same remains unexecuted, then at the expiration of four calendar months from the date thereof, or sooner if the sheriff, &c., shall be thereto required by the order of the Court or a Judge (o).

*In what cases.*] If the defendant do not appear to the writ according to the condition of the bail bond (if he have given one), that is, if he do not put in and perfect bail above, or render himself, in due time, the bail bond is forfeited; and the plaintiff has the option either of taking an assignment of it, and proceeding thereon, or of proceeding against the sheriff to compel him to return the writ and bring in the body of the defendant, or, in other words, to put in and perfect special bail. If the bail to the sheriff be good and sufficient persons, it is usual, and in most cases advisable, to take an assignment of the bail bond, and proceed on it, in preference to proceeding against the sheriff. If the sheriff have discharged the defendant without taking a bail bond or deposit, the plaintiff has then his option of proceeding against the sheriff, either by action for the escape (*see ante*, pp. 127, 128, *post*), or by attachment, after ruling him to return the writ and bring in the body.

The first proceeding against the sheriff, to compel him to put in and justify bail, is by ruling, or, in vacation, by obtaining a Judge's order for him to return the writ; or if bail have been already put in, but not justified, then except to the bail and serve a notice of exception, and then rule, or, in vacation, obtain a Judge's order for the sheriff to return the writ, in order to compel a justification. This mode of proceeding, however, should be adopted without any unnecessary delay intervening; if the plaintiff lie by, without resorting to his remedy against the sheriff, the Court will not in general interfere to compel

(n) See *Perkins v. Meacher*, 1 Dowl. 279.  
P. C. 21; *Baker v. Davenport*, 8 D. &  
R. 606; *Cavenagh v. Collet*, 4 B. & Ald. 96.

(o) See the form of the writ, *ante*,

the sheriff to put in and justify bail, particularly if by such delay the sheriff be placed in a worse situation than he would have been, if he had been ruled or ordered to return the writ in the first instance; for the rule or order to return the writ is the first intimation the sheriff has that the defendant has made default (*p*). And it may be here mentioned as a general rule, that it is necessary that the proceedings against the sheriff should keep pace with the times allowed for putting in and perfecting bail; otherwise this inconvenience might ensue, that the sheriff might be fixed with the payment of debt and costs, and upon his bringing an action against the defendant or his bail upon the bail bond, they might plead *comperuit ad diem* (*q*).

But there are many cases, in which the plaintiff cannot proceed against the sheriff; as, where the defendant surrenders himself to the sheriff, before the expiration of eight days inclusive after the execution of the writ (*r*), or where the plaintiff has already taken an assignment of the bail bond (*s*), provided it be a valid bond, within the stat. 23 II. 6, c. 9 (*t*); or where he accepts of a *cognovit* or other security from the defendant, without the privity of the sheriff (*u*); or where the arrest has been made by a special bailiff, nominated by the plaintiff or his agent; (*ante p.* 112); in which case if the sheriff be ruled to return the writ, he should move the Court to set aside such rule (*x*).

Also the sheriff is not liable to be called upon to make a return of any writ or process, unless required by rule of Court (*y*), or Judge's order (*z*), to do so within six months after the expiration of his office; (20 G. 2, c. 37, s. 2); which months are lunar months; and the day upon which the sheriff quits his office is reckoned inclusive (*a*). But if he be ruled or ordered to return the writ before the expiration of the six months, and he neglect to do so, the statute does not prevent you from applying for the attachment after that time (*b*).

*When and how obtained.*] In cases in which the plaintiff is at liberty to proceed against the sheriff, and elects to do so, his first proceeding is to obtain this rule or order to return the writ. In *term time* this rule is a side bar rule, and may be drawn up by the clerk of the rules, as a matter of course, on producing a *præcipe* for it; or it may be obtained by motion in Court. In *vacation*, instead of the rule, you may obtain a Judge's order for the return of the writ, which will have the same effect as the rule for that purpose, although no attachment

(*p*) *Rex v. Sheriff of Surrey*, in *Morris v. Duffield*, 9 East, 467; *Rex v. Perring*, 3 B. & P. 151; *Rex v. Sheriffs of London*, in *Hobhouse v. Middleditch*, 2 Chit. Rep. 58.

(*q*) Tidd, 9th ed. 310; *Hutchins v. Hird*, 5 T. R. 479.

(*r*) 2 Saund. 61 b.

(*s*) 2 Saund. 60 b; *Etherick v. Cowper*, 1 Salk. 99; *Grosvenor v. Soume*, 3 Id. 57; *Ladd v. Arnaboldi*, 1 Crom. & J. 97, 105.

(*t*) *Brooke v. Stone*, 1 Wils. 223; 2 Saund. 61 c; and see *ante*, p. 123, 124.

(*u*) *Rex v. Sheriff of Surrey*, in *Brewer v. Clarke*, 1 Taunt. 159; and see

*Clift v. Gye*, 9 B. & Cres. 422; *post*, 144.

(*x*) *Pallister v. Pallister*, 1 Chit. Rep. 614, n.

(*y*) *Rex v. Jones*, 2 T. R. 1; *Rex v. Adderley*, Doug. 463, n.

(*z*) See the form of the writ, *ante*, 96, *et infra*.

(*a*) *Rex v. Adderley*, Doug. 463; and see *Rex v. Sheriff of Middlesex*, 4 East, 604; *sed quare* as to the day being inclusive. See cases collected in 5 Burn, J., 26th ed. 925, and *ante*, 58.

(*b*) *Rex v. Adderley*, Doug. 463, n.; 2 Saund. 61 c.

can issue for disobedience of such order, until it has been made a rule of court (c).

If in term, *make out a præcipe for the rule, and apply to the clerk of the rules for such rule, who will draw it up. Mention to him the name of the officer who made the arrest, &c. Pay 6s. 6d., or, if to a county palatine or the Cinque Ports, 7s. If in vacation, take out a Judge's summons, and attend him thereon, as in other cases (d), and obtain his order for the return of the writ. It is usual to lay before the Judge an affidavit of the facts.* It must be observed, as to counties palatine, that the rule or order is not to be made on the chancellor or person to whom the writ was directed, but on the sheriff of the county (e). The rule or order calls upon the sheriff to return the writ within a certain time after notice to be given to his under-sheriff (f). This time is four days in London and Middlesex; (*R. T. 6 G. 3*); but six days in other counties, &c. (*R. T. 5 & 6 G. 2*). If the rule be on the late sheriff, it should style him "late sheriff."

*Service.*] A copy of the rule or order (with the name of the officer by whom the defendant was arrested indorsed on it) must be served personally on the sheriff or his under-sheriff (g), and the original rule or order at the same time shewn to him (h). In London it is served on the deputy secondary, at his office, 28, Coleman-street; in Middlesex, on Mr. Burchell, at the sheriff's office, Bedford-street, Bedford-row; in Surrey, either on the sheriff or under-sheriff, or on his agent in London (i); and in all other counties on the under-sheriff (k), or on his agent (l). *When you serve the copy of the rule or order, take a memorandum of the name of the person on whom you have served it, that you may insert it afterwards in your affidavit of service.*

*Return.*] The sheriff must return the writ within the time limited by the rule or order, (or, if the office of the *custos brevium* be closed, as soon after as it opens), and this whether in term or vacation, otherwise he will be in contempt, (*R. M. 32 G. 3*; *R. II. 2 W. 4, r. 11*) (m), and subject to an attachment, as hereafter (*post*, p. 134) mentioned. In order to make sheriffs punctual in their return of writs, it is ordered that the *custos brevium* shall indorse on every writ the day and hour at which it is filed. (*R. T. 30 G. 3*; *R. II. 2 W. 4, reg. 12*).

When the time limited by the rule or order has expired, search with the *custos brevium*, at the Treasury chamber, Westminster-hall, if the writ have been returned. If the sheriff have taken a bail bond and returned *cepi corpus et paratum habeo* and no bail be yet put in, you have still the option of taking an assignment of the bail bond, or

(c) 2 W. 4, c. 39, s. 15; *R. M. 3 W. 4, r. 13*. Before this act, the rule to return the writ could in no case be drawn up in vacation. *Rex v. Sheriff of Cornwall*, 1 Term Rep. 552.

(d) See *post*, Vol. 2, Book 4, Chap. 34.  
(e) 1 Sellon, 195.

(f) See the forms, *Chit. Forms*, 50, 51.  
(g) See *Cave v. Price*, Barnes, 30; *Vaughan v. Sawyer*, Id. 35.

(h) *Barnard v. Berger*, 1 New Rep. 121; *Rex v. Smithies*, 3 T. R. 351.

(i) *Rex v. Coles*, Doug. 420.

(k) *Cave v. Price*, Barnes, 30.

(l) *Rex v. Sheriff of Sussex*, MS. H. 1820; but see *Rex v. Coles*, Doug. 420, *contra*.

(m) Formerly, if the rule expired in vacation, the sheriff had the entire of the first day of the next term to file his return. *Rex v. Sheriff of Berks*, 5 East, 386, 1 Smith, 427, S. C.; *Rex v. Sheriff of Surrey*, 11 East, 591.

of proceeding further against the sheriff by ruling or obtaining a Judge's order for him to bring in the body; or if *bail have been put in* but not justified, then except to them, and rule or order the sheriff to bring in the body, in order to compel a justification. If the sheriff have taken the defendant, and let him go at large *without a bail bond*, and return *cepi corpus et paratum habeo*, he may be sued for an escape if the defendant be not in custody, or bail above be not duly put in and perfected (n). If the sheriff return *non est inventus*, where he has taken or might have taken the defendant, he is liable to an action for a false return (o). Formerly, when the writ did not contain a *non omittas* clause, if the sheriff returned "*mandavi ballivo* and that he hath not given any answer thereto," you had to sue out a *non omittas* writ directed to the same sheriff; or, if the bailiff had returned *cepi corpus*, you might have ruled such bailiff to bring in the body (p): but now the writ of *cupias* is a *non omittas* writ in the first instance.

On a return of *cepi corpus*, the sheriff, instead of returning that he has the defendant ready, or in custody, to answer the plaintiff, may return, by way of excuse, that he is sick, or has been rescued. If he return that he is sick, the illness of the defendant at the return must appear on the return (q).

*Attachment.*] If the sheriff having been duly served with the rule or order for the return of the writ, as above mentioned, does not make his return within the time limited by such rule or order, he will be in contempt, and subject to an attachment (r). You may ascertain whether he has made it, by searching, as above mentioned, with the *custos brevium*. If the sheriff so in contempt has been ruled by the Court to return the writ, and the rule expires *in term*, you may move the Court for this attachment on the day following; (*R. M.* 32 G. 3); or, if it expire on the last day of term, then you may move for it on that day, at the rising of the Court (s); or, if it expire in vacation, you may move for it on the first day of next term. (*R. H.* 2 W. 4, r. 11) (t). If the sheriff so in contempt has been ordered by a Judge *in vacation* to return the writ, then, in the term next following such order, you should make such order a rule of Court; for which purpose give a brief to counsel "to move to make the Judge's order a rule of Court," which requires counsel's signature only. It will not be necessary to serve such rule of Court, or to make any fresh demand of performance thereon, but an attachment may be forthwith obtained for disobedience of such order; and this, whether or not the order has been performed in the meantime. (*R. M.* 3 W. 4, r. 13).

*This attachment is moved for in term time, upon an affidavit stating*

(n) 1 Gilb. C. P. 22; *Ellis v. Yarborough*, 2 Mod. 178.

(o) *Beckford v. Montague*, 2 Esp. 475.

(p) *Boothman v. Earl of Surrey*, 2 T. R. 5, 10.

(q) *Perkins v. Meacher*, 1 Dowl. P. C. 21; *Cavenagh v. Collett*, 4 B. & Ald. 270. See forms of returns, Chit. Forms, 51, 52.

(r) See *Alchin v. Wells*, 5 T. R. 470.

(s) *Rex v. Sheriff of Surrey*, 11 East, 591, 1 Chit. Rep. 356, a. S. C.

(t) Formerly, in such case, in this Court, you could not move until the second day of the next term. *Rex v. Sheriff of Berks*, 5 East, 386; *aliter* in C. P. and Exch. *R. v. Sheriff of Middlesex*, in *Thompson v. Powell*, 5 Taunt. 647; *Smith v. Bythe*, 9 Price, 255.

a personal service of a copy of the rule or Judge's order to return the writ, that such rule or order was at the same time shewn to the person served (u), and that the writ is not filed; and in the case of a Judge's order for the return, such affidavit should also state, that the order has been made a rule of Court, in the term next following such order (x). As to the proceedings upon the attachment, see post, p. 138; and see post, Vol. 2, Book 4, Part 3, title "Attachment."

## 2. Rule or Order to bring in the Body.

After the sheriff has returned *cepi corpus*, if the defendant be still at large, and no bail put in, your next step against the sheriff is to rule, or, in vacation, to obtain a Judge's order for him to bring in the body; or, if bail have been put in, but not justified, then except to them, and serve a notice of exception (z), and then rule, or, in vacation, obtain a Judge's order for the sheriff to bring in the body, in order to compel a justification (a). Where the plaintiff, having obtained his debt and costs in an action against the sheriff for an escape, but wishing also to proceed in the original action, ruled the sheriff to bring in the body; the Court, upon application, discharged the rule (b).

*When and how obtained and served.*] In term time, this rule is a side bar rule, and may be drawn up by the clerk of the rules, as a matter of course, on producing a *præcipe* for it; or it may be obtained by motion in Court. In vacation, you should obtain a Judge's order for the sheriff to bring in the body, which will have the same effect as the rule for that purpose, although no attachment can issue for disobedience of such order, until it has been made a rule of Court. (*R. H. 3 W. 4*). Obtain this rule or order in the mode already directed ante, 133, as to obtaining the rule or order for the return of the writ, except that you pay the clerk of the rules only 4s., or, if to a county palatine or the cinque ports, 4s. 6d. (c). Care should be taken that there be no unnecessary delay in obtaining this rule or order, after the eight days have elapsed from the execution of the writ; for where a writ of *latitat* was returned in Hilary term, and the rule to bring in the body not taken out until the Michaelmas term following, the Court set aside an attachment for not obeying it (d). It may be obtained even on the day the sheriff returns the writ, provided the time for putting in bail have then expired (e); but not before the time for putting in bail has expired (f).

It was formerly the practice, when the sheriff was out of office, to

(x) See *Rex v. Smithies*, 3 T. R. 351; *Barnard v. Berger*, 1 New Rep. 121; *R. M. 3 W. 4*, r. 13.

(y) *R. M. 3 W. 4*, r. 13. See the forms of affidavits, Chit. Forms, 53, 54, and the attachment and proceedings thereon, *Id.* 54, 56, 57.

(z) *Rex v. Sheriff of Middlesex*, 8 T. R. 258; *Rogers v. Mupleback*, 1 H. Bl. 107; *Price v. Street*, Barnes, 102.

(a) See 2 Saund. 61 d; *Woolfe v. Colliuwood*, 1 Wils. 262.

(b) *Borwick v. Walton*, 2 B. & Ald.

623; 1 Chit. Rep. 393, S. C.

(c) See form of the rule or order, Chit. Forms, 54, 55.

(d) *Rex v. Sheriff of Surrey*, 7 T. R. 452; and see *Rex v. Sheriff of London*, in *Peacock v. Leigh*, 1 Taunt. 111; *Ruston v. Hatfield*, 3 B. & Ald. 204.

(e) *Rex v. Sheriff of Middlesex*, in *Pouchee v. Levien*, 4 M. & S. 427; see *Hutchins v. Hird*, 5 T. R. 479; *Rex v. Sheriffs of London*, 2 East, 241, *contra*.

(f) *Rex v. Sheriff of Middlesex*, in *Potter v. Marsden*, 8 East, 525; *Rulfe v.*

proceed against him by *distringas*, to compel him to bring in the body; but the practice has been altered in this respect; and the plaintiff may now, within the time limited by law, rule or obtain an order on him to bring in the body, notwithstanding he be out of office before the rule or order is granted; (*R. T. 31 G. 3, r. 1*); or if ruled on the last day of the term to bring in the body, and he go out of office before the next term, he will be liable to an attachment for not obeying the rule (*i*). In these cases, where the arrest was made by the late sheriff, care must be taken to rule the late, and not the present, sheriff.

*Service.*] It must be served in the same manner as the rule or order to return the writ. (*See ante, p. 133*).

*How complied with.*] The time limited by this rule or order is four days in London and Middlesex, (*R. T. 6 G. 3*), and six days in every other county, &c. (*R. T. 5 & 6 G. 2*). Within the time limited by it, the sheriff must either bring the defendant into Court, or put in special bail and perfect it; otherwise the Court will grant an attachment against him, as presently mentioned (*k*). Formerly, if the rule expired on the last day of the term, the sheriff had always the entire of the first day of the next term, to justify bail, or otherwise comply with the rule (*l*); but now the bail must, if the notice of exception require them so to do, (*R. H. 2 W. 4, r. 17, post, 162*), justify before a Judge in vacation. If the time limited have expired, and the rule or order be not complied with, the contempt is not purged by rendering the defendant, or by putting in and perfecting bail on a subsequent day, although before the attachment is moved for (*m*); and if two days time to justify be given, and bail are not justified on the last of the two days, an attachment may issue on that day (*n*); and if the defendant in such a case were to die, after the sheriff is once in contempt by not bringing in the body, the attachment might afterwards issue against him for the previous contempt, although the original cause abated by the defendant's death (*o*). Where the return to the writ stated that the defendant was insane, and could not be removed without great danger, and that he continued so until the return of the writ, the Court refused an attachment against the sheriff (*p*). The sheriff is bound to obey the rule, notwithstanding the plaintiff's proceedings are stayed by an injunction obtained by defendant (*q*).

The sheriff is not obliged to bring the defendant actually into Court; if he shew that he is in his custody (*r*), or have rendered in

*Steele*, 2 H. Bl. 276; *Hutchins v. Hird*, 5 T. R. 479.

(*i*) *Meekins v. Smith*, 1 H. Bl. 629.

(*k*) See *Woolf v. Collingwood*, 1 Wils. 262; and see *Moses v. Norris*, 4 M. & S. 397; *Rex v. Sheriff of Middlesex*, in *Lister v. Goldstein*, 2 D. & R. 225; *Vanderhaden v. Britten*, 4 D. & R. 155.

(*l*) *Rex v. Sheriff of Middlesex*, in *Brown v. Culver*, 8 T. R. 464.

(*m*) *R. H. 3 W. 4*; *Rex v. Sheriff of Middlesex*, 8 T. R. 30. *Sed vide Rex v. Sheriff of Middlesex*, 2 M. & Sel. 562;

*Thorold v. Fisher*, 1 H. Bl. 9.

(*n*) *Thompson's bail*, 1 Chit. Rep. 310; and see *Rex v. Sheriff of Middlesex*, in *Lister v. Goldstein*, 2 D. & R. 225.

(*o*) *Rex v. Sheriff of Middlesex*, 3 T. R. 133.

(*p*) *Cavenagh v. Collett*, 4 B. & Ald. 279; see *Baker v. Davenport*, 8 D. & R. 606, *Perkins v. Meacher*, 1 Dowl. P. C. 21; *ante*, 134.

(*q*) *Rex v. Sheriff of Middlesex*, 1 Dowl. P. C. 454.

(*r*) *Macleod v. Marsden*, Barnes, 32.

discharge of his bail (*s*), it is sufficient; and for this purpose, if the defendant be not in the sheriff's custody at the return of the writ, the sheriff or his officer may put in bail for him, and these bail may immediately take him, and render him in their discharge (*t*), without justifying (*u*).

*Attachment.*] If upon the expiration of the time limited by the rule or order to bring in the body, the sheriff have not complied with it in the manner above mentioned, by having the defendant in custody, or by putting in and perfecting special bail, he will be in contempt, and subject to an attachment. If the sheriff so in contempt has been ruled to bring in the body, and the rule expires *in term*, you may move the Court for this attachment on the following day (*x*); or if it expire on the last day of term, then you may move for it at the rising of the Court on that day (*y*); or if it expire in vacation, you may move for it on the first day of next term. If the sheriff so in contempt has been ordered by a Judge, *in vacation*, to bring in the body, then in the term next following such order, you should make such order a rule of Court; for which purpose, give a brief to counsel "to move to make the Judge's order a rule of Court;" which requires counsel's signature only. It will not be necessary to serve such rule of Court, or to make any fresh demand of performance thereon; but an attachment may be forthwith obtained for disobedience of such order, and this whether or not it has been performed in the mean time. (*R. H. 3 W. 4*). It is essential that it should be moved for without any unnecessary delay, otherwise the Court will not grant it: where the rule to bring in the body was served on the 19th November, and the attachment not sued out until the 9th March, the Court set aside the attachment (*z*). So, where the rule was served on the 11th February, and the attachment did not issue till the 3rd of May, returnable the 4th, and the defendant had become bankrupt in March, whereby the sheriff had lost his opportunity of proving the debt under the commission, the Court set aside the attachment (*a*). If the sheriff being served with the rule or order to bring in the body, afterwards, and, before it expires, go out of office, he is liable to the attachment, in the same manner as if he were still the officer of the Court (*b*). The rule for the attachment is absolute in the first instance; and may be moved for on the last day of term (*c*).

*This attachment is moved for in term time, on an affidavit of service of a copy of the rule or order, and that the original was shewn at the same time (d), and also that no bail has been put in, or that bail has been*

(*s*) *Rex v. Sheriff of Middlesex*, in *Brown v. Culver*, 8 T. R. 464; *Rex v. Sheriff of Middlesex*, 7 Id. 527.

(*t*) *Rex v. Butcher*, Peake, 169.

(*u*) *Rex v. Sheriff of Middlesex*, 7 T. R. 527. *Vide post*, 151, 164.

(*x*) 2 Saund. 61 d. See *Rex v. Sheriff of Middlesex*, in *Brown v. Culver*, 8 T. R. 464, *ante*, 136.

(*y*) *Rex v. Sheriff of Surrey*, 11 East,

591; 1 Chit. Rep. 356, n.; *Rex v. Sheriff of Middlesex*, in *Davis v. Allen*, 1 Dowl. P. C. 53; see Tidd, 9th ed. 312.

(*z*) *Rex v. Perring*, 3 B. & P. 151.

(*a*) *Rex v. Sheriff of Surrey*, in *Morris v. Duffield*, 9 East, 467.

(*b*) *Meekins v. Smith*, 1 H. Bl. 629.

(*c*) 1 Bur. 651.

(*d*) *Rex v. Smithies*, 3 T. R. 351.



put in but not justified (e). And in the case of a Judge's order to bring in the body, the affidavit should also state that the order has been made a rule of Court in the term next following such order. If the affidavit be not sufficient, the Court will allow an additional affidavit to be made (f).

### 3. The Attachment.

The attachment is a criminal process, directed to the coroner when it issues against the present sheriff, or to the present sheriff when it issues against the late sheriff (g), commanding him to attach the sheriff, so that he have him in Court on a general return day (h) to answer "for certain trespasses and contempts by him lately done and committed in our Court before us."

The attachment is sued out and proceeded on thus: Go to the Rule office, and get the rule for the attachment (i). Take it to the Crown office, and one of the clerks will make out the attachment (j); pay 13s. 6d. Then make out your bill of costs (including the coroner's fee and 2s. 6d. for the warrant), and take it and the attachment to the coroner, to whom it is directed, and he will grant a warrant thereon. Upon the return of the attachment, call on the coroner, and he will pay you. Or, if he do not, get a side bar rule at the Crown office for the coroner to return the writ of attachment (k); upon the expiration of that rule, if he have not returned the writ of attachment, move the Court for an attachment, upon affidavit of the service of the rule to return the attachment, and that the attachment was not returned, and they will grant an attachment against the coroner, absolute in the first instance (l), directed to elizors (m); and upon being taken under this attachment, the coroner of course will pay you the debt and costs. But if the coroner return that he has taken the sheriff, then get your clerk in court to obtain a rule for a habeas corpora to bring in the body of the sheriff, which rule is obtained upon counsel's signature merely (n). And lastly, if the habeas corpora be not obeyed, move for a rule for an attachment against the coroner for not bringing in the body of the sheriff (o); and upon being taken under this attachment, the coroner will of course pay you the debt and costs.

As to the amount for which the sheriff is liable, see *post*, pp. 148, 149.

(e) See the form, Chit. Forms, 56.

(f) *Rex v. Smithies*, 3 T. R. 351.

(g) 1 Sellon, 201.

(h) *Rex v. Wilkins*, 1 Str. 624.

(i) See the forms of the rules, Chit. Forms, 54, 56.

(j) See the forms of attachments, Chit. Forms, 56, 57.

(k) See the form, Chit. Forms, 58.

(l) *Andrews v. Sharp*, 2 W. Bl. 911;

*Rex v. Peckham*, Id. 1218.

(m) See form of rule for the attachment, Chit. Forms, 58; and of the attachment, Id.

(n) *Rex v. Whaley*, 1 Chit. Rep. 249; see the form of the rule, Chit. Forms, 58; and of the habeas corpora, Id. 59.

(o) See form of rule, Chit. Forms, 56, No. 22.

## SECT. 6.

*Proceedings on the Bail Bond.*

1. *Assignment of the Bail Bond*, 138.
2. *Action on the Bail Bond, by the Plaintiff*, 140.
3. *Action on the Bail Bond, by the Sheriff*, 142.

1. *Assignment of the Bail Bond.*

*In what cases.*] Where the defendant is arrested and the sheriff takes a bail bond, the sheriff shall, at the request and cost of the plaintiff or his attorney, assign to the plaintiff such bail bond, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses. (4 A. c. 16, s. 20).

If the bail to the sheriff be sufficient, it is usual for the plaintiff to take an assignment of the bail bond, and proceed upon it, instead of proceeding against the sheriff. *For this purpose, if in Middlesex, apply at the sheriff's office in Red Lion Square,—if in London, at the secondary's office, 28, Coleman Street,—or, if in any other county, at the office of the sub-sheriff or of his agent in town; and the bond, with an assignment to the plaintiff indorsed on it, will be given to you; in London and Middlesex pay 5s.; in any other county, &c. 6s. 8d. (p).* The bond may be assigned in any county (q).

If the sheriff refuse to assign the bond, the only remedy is by an action on the case against him (r). The plaintiff, however, cannot take an assignment of the bail bond after service of the rule of allowance of bail (s), or if the defendant have rendered himself before the return of the writ (t); nor can he insist on it after suing out an attachment against the sheriff for not bringing in the body, for, by doing so, he has made his election to proceed against the sheriff; yet, in such a case, the plaintiff may take an assignment of the bond, if the sheriff choose to assign it (u). Nor can he insist on it after he has ruled the sheriff to bring in the body (x), though this was formerly otherwise (y).

*When and how.*] It is said that the bail bond may be assigned before it is forfeited (z); but this is not usual, nor in all cases advisable; and the plaintiff cannot in any case proceed upon the bond before forfeiture, nor can he proceed on it pending a rule to bring in

(p) See the form of the assignment, Chit. Forms, 59.

(q) *Gregson v. Heather*, 2 L. Raym. 1455, 2 Str. 727, S. C.

(r) *Stamper v. Milbourne*, 7 T. R. 122; and see *Mendez v. Bridges*, 5 Taunt. 325.

(s) *Murray v. Durand*, 1 Esp. 87; and see *How v. Lacy*, 1 Taunt. 119; *Rex v. Sheriff of Middlesex*, 4 T. R. 493; *post*, p. 143.

(t) *Jones v. Lander*, 6 T. R. 753; *Stamper v. Milbourne*, 7 T. R. 122; *Hyde v. Whiskard*, 8 T. R. 456; *Plimpton v.*

*Howell*, 10 East, 100; see *Brown v. Jennings*, 2 B. & Ald. 768.

(u) *Poole v. Wyatt*, 15 East, 215; 1 Chit. Rep. 394, n.

(x) *Wright v. Walker*, 3 B. & P. 564; *Blackford v. Hawkins*, 7 Moore, 600, 1 Bingh. 181, S. C.; *Posterne v. Hanson*, 2 Saund. 60 b; and see 7 B. & Cres. 480, n.

(y) *Robinson v. Owen*, Tidd, 9th ed. 297; 10 East, 34.

(z) *Paradice v. Holiday*, Barnes, 77; but see *Dent v. Westm*, 8 T. R. 4.

the body. (*R. H. 2 W. 4, reg. 23*). But, at any time after forfeiture, the plaintiff may take the assignment (*a*).

The assignment must be made by indorsement on the back of the bond, under the hand and seal of the sheriff or other officer, and made in the presence of two or more credible witnesses. (*4 A. c. 16, s. 20*). It need not be stamped. (*6 G. 4, c. 41*).

*By whom.*] The assignment may be made by the under-sheriff, in the sheriff's name, or by the sheriff himself; but not by the under-sheriff's clerk, or it will be void (*b*).

*Effect of it.*] By taking an assignment of the bail bond, the plaintiff discharges the sheriff, and cannot afterwards call upon him even to return the writ; provided the bond be valid. (*Ante, p. 132*). So, after the assignment, the plaintiff cannot demand a plea, or otherwise proceed in the original action, without waiving his right of action on the bail bond. Formerly, if after the assignment the bail to the sheriff became bail above, the plaintiff could not except to them; but, by the late rule of *H. T. 2 W. 4, reg. 15*, this is now otherwise. (*Post, p. 159*).

## 2. Action on the Bail Bond, by the Plaintiff.

*When and how to be brought.*] If the bail bond be forfeited, the plaintiff, after assignment, may bring an action on it in his own name. (*4 A. c. 16, s. 20*). And though he become bankrupt the action may be brought in his name (*e*).

The bail bond is forfeited by the non-appearance of the defendant; that is to say, by his not having put in special bail, (if he be not in custody in the action), within eight days after the execution of the writ of *capias* on him, inclusive of the day of such execution, or, if special bail be put in within that time, then by his not perfecting them in due time.

If bail be not put in in time, the plaintiff may proceed upon the bail bond, unless bail be not only put in, but also justified, (whether excepted to or not), before action brought (*f*). But where persons are put in as bail, who cannot, according to the rules of the Court, become bail, the plaintiff cannot treat this as a nullity, and proceed upon the bail bond, but must except to the bail, and proceed as if regular bail had been put in (*g*). This latter rule, however, does not apply to the case of a practising attorney, or a practising attorney's clerk being put in as bail (except for rendering only), in which case the plaintiff may treat the bail as a nullity, and sue on the bail bond as soon as the time for putting in bail has expired, unless good bail be put in in the mean time. (*R. H. 2 W. 4, reg. 13*).

(*a*) *Merryman v. Carpenter*, 2 Str. 1262. Before the 2 W. 4, c. 39, the plaintiff could not, in the Court of Common Pleas, take an assignment of the bond after two terms from the term in which the writ was returnable. *Sparrow v. Naylor*, 2 W. Bl. 876; and

see *Collett v. Bland*, 4 Taunt. 715; *Wynne v. Clarke*, 5 Taunt. 649.

(*b*) *Kitson v. Fagg*, 1 Str. 60.

(*c*) *MS. T. T. 1831, K. B.*

(*f*) See *Turner v. Cary*, 7 East, 607.

(*g*) *Hawkins v. Magnall*, Doug 466; *Rea v. Sheriff of Surrey*, 2 East, 181.

By *R. H. 2 W. 4, r. 24*, the action on the bail bond could not in any case be commenced until the expiration of four days exclusive from the appearance day of the process, if the arrest were in London or Middlesex, or until the expiration of eight days exclusive from the appearance day of the process, if the arrest were in any other county. (*R. H. 2 W. 4, reg. 24*) (i). But this rule is not now applicable to the action on a bail bond taken on an arrest under the process prescribed by the recent act, *2 W. 4, c. 39 (k)*.

When the sheriff is ruled to bring in the body, proceedings cannot be taken on the bail bond until that rule has expired; (*R. H. 2 W. 4, r. 23*); and if bail above are justified before that time, the bail below may, in an action on the bond, plead *comperuit ad diem*, and that plea is satisfied by the production of the recognizance roll, containing an entry of the defendant's appearance generally, and such roll may be made up at any day before the day given for producing it (l).

In order to commence an action on the bail bond, after having obtained an assignment of it, sue out a writ of summons against the bail and principal, and serve them with copies thereof. Afterwards deliver your declaration (m), and proceed as in ordinary cases in nonbailable actions. (See post, 441, 456). You must take care to commence the action against all the parties to the bond jointly, if they be forthcoming and can be served with the process, or if there be not some other good reason for suing them separately; for if separate actions were brought against each of the parties, without any sufficient reason for so doing, the Court or a Judge, upon application, would stay the proceedings in all, upon payment of the debt and costs in one of the actions only. (*R. H. 2 W. 4, r. 30*) (n). Such application must, however, be made in a reasonable time, and, at all events, before verdict (o). If you cannot, however, from circumstances, bring your action against all jointly, you must bring actions against them severally; you cannot sue two of the three jointly, without subjecting yourself to a plea in abatement for nonjoinder.

Where.] The action, when brought by the assignee of the bond, must be brought in this Court, if the original action were commenced here (p). But if the action be brought by the sheriff himself, it may be brought in any Court. (*R. H. 2 W. 4, reg. 28*). The defendant cannot take advantage of the action being brought in a wrong Court, under the plea of *non est factum* (q).

(i) See the former rule in *C. P. T. T. 30 G. 3*; and *Bond v. Evans*, 4 B. & C. 864, 7 D. & R. 374, 7 B. & C. 478, 1 M. & R. 298, S. C.

(k) *Hillary v. Rowles*, 2 Dowl. P. C. 201; and see, per Bayley, J., *Alston v. Underhill*, 1 C. & M. 494, 2 Dowl. P. C. 26, S. C.

(l) *Whittle v. Oldaker*, 7 B. & Cres. 478, 1 M. & R. 298, S. C. See *Ladd v. Arnaboldi*, 1 Crompt. & J. 97.

(m) See form of the declaration, Chit. Forms, 59.

(n) *Key v. Hill*, 2 B. & Ald. 598, 1 Chit. Rep. 337, S. C.

(o) *Johnson v. Macdonald*, 2 Dowl. P. C. 44.

(p) *Morris v. Rees*, 3 Wils. 348, 2 W. Bl. 639, S. C.; *Rees v. Hensley*, 1 Bur. 649, 2 Ld. Ken. 366, S. C.; *Watson v. Bent*, 3 Id. 1923.

(q) *Wright v. Walsley*, 2 Camp. 396.

*Venue.*] The venue may be laid in any county, the declaration stating the assignment to have been made in that county (*q*).

*Bail.*] Neither the principal, nor bail, can be holden to bail in an action on the bail bond; but when judgment has been obtained in an action on the bail bond, they may be holden to bail in an action on the judgment. (*Ante*, p. 70).

### 3. Action on the Bail Bond, by the Sheriff.

The only difference between the proceedings in this case, and when the action is brought by the assignee of the sheriff, is, that the action in this case must be brought in the name of the sheriff (*r*), although actually brought by the sheriff's officer who took the bond (which is usually the case), and for his benefit alone. The action also may be brought in any Court. (*R. H. 2 W. 4, r. 28*). The declaration also is different, it being usually, as on a common money bond, without setting out the condition.

## SECT. 7.

### *Setting aside or staying Proceedings, &c. against the Sheriff upon the Bail Bond.*

*For irregularity.*] If any of the proceedings against the sheriff be irregular, the Court will set them aside, or any attachment founded on them, with costs. So, if any of the previous proceedings of the plaintiff, relative to the bail, be irregular, the sheriff is not liable to an attachment, upon such bail not afterwards being perfected. Thus, for instance, if bail be put in in time, but no exception be entered (*s*), or merely a verbal and not a written notice of exception be given (*t*), or the notice of exception be intitled "In the Common Pleas," instead of "In the King's Bench" (*u*), or the like; the Court, upon application, will set aside the attachment for the irregularity, even although such irregularity have been waived, as respects the defendant, by his subsequent act (*v*): In the manuscript case, cited in note (*u*), *infra*, *Abbott, C. J.*, in making the rule absolute, said, "In the case of attachments against the sheriff, it is best, as a general rule, to hold the parties to strict regularity in their proceedings." So, where the attachment was obtained pending a summons to stay proceedings in the original action, on payment of debt and costs, the Court set it aside for irregularity (*x*). So, where the arrest was made by a special bailiff, in which case, we have seen, the plaintiff

(*q*) *Gregson v. Heather*, 2 Str. 727, 2 L. Haym. 1455, S. C.; *sed vide* Imp. 16, Dalt. 22, as to the statement of the assignment being made in that county.

} 2 Saund. 61 c.

*Rogers v. Mapleback*, 1 H. Bl. 106; *son v. Garrett*, 1 Chit. Rep. 174; and it is no waiver that the defendant serve

two notices of justification.

(*t*) *Cohn v. Davis*, 1 H. Bl. 80.

(*u*) MS. H. 1822.

(*v*) *Rogers v. Mapleback*, 1 H. Bl. 106.

(*x*) *Rez v. Sheriff of Middlesex*, in *Woodward v. Feltham*, 5 B. & Ald. 746; and cases, *post*, Vol. 2, Book 4, Part 1, Chap. 10.

cannot regularly rule the sheriff, either to return the writ or bring in the body (*ante*, 112, 132); the Court will set aside the attachment for irregularity, with costs.

So, if there be any irregularity in the assignment of the bail bond, or in the proceedings in the action against the bail, the Court will set aside such proceedings for the irregularity with costs. Or, if the action on the bail bond be commenced pending a rule staying the proceedings in the original action, the Court will set aside the proceedings in the action on such bond, with costs (*y*). When the defendant obtains a rule which stays the plaintiff's proceedings, he is not entitled, after it is discharged, to the same time for the purpose of taking the next step as he had when he obtained the rule; he would be only entitled, in such case, to have a reasonable time allowed him, for the purpose of taking his next proceeding; and it has been determined that the whole of the day on which the rule is disposed of is a reasonable time for that purpose (*z*). So, if an action on the bail bond be commenced, after bail put in and justified and the rule of allowance served; or after bail put in, and during the time the defendant has, by the rules of the Court, to justify his bail, or after render, and notice thereof duly given (*a*); or the like; or before the expiration of a rule served to bring in the body (*ante*, 140); the Court will set aside the proceedings in such action for irregularity, with costs. So, if the plaintiff proceed against the sheriff after taking an assignment of the bail bond, the Court will set aside the proceedings for irregularity; (*see ante*, 132); but, on the other hand, a plaintiff, we have seen (*ante*, 139), may abandon his proceedings against the sheriff, and proceed upon the bail bond (*b*). So, if it appear that the writ, upon which the defendant was arrested, is *void*, perhaps the Court would set aside the proceedings on the bail bond (*c*). They have refused to interfere summarily, where the defect was in the bail bond itself (*d*), but left the defendant to avail himself of it by plea. It seems, however, they will, where the defendant has been arrested by a wrong name, and where the plaintiff has not used due diligence to obtain knowledge of the defendant's proper name, order the bail bond to be delivered up to be cancelled (*e*).

*For other causes.*] If the bail bond has been assigned, and the plaintiff proceed upon it, owing to some mistake of the defendant or his attorney in putting in bail, or the like, the Court will stay the proceedings upon the bail bond upon payment of costs, and order the mistake to be rectified (*f*); and the same, as to proceedings against

(y) *Swayne v. Cramond*, 4 T. R. 176.

(z) *Hughes v. Walden*, 5 B. & C. 771. See *St. Hanslaire v. Byam*, 4 B. & C. 970, 7 D. & R. 458, S. C.

(a) If the notice be given before the assignment, the Court will stay the proceedings, without costs. *Anon.* 2 Chit. Rep. 103; and see *Edwin v. Allen*, 5 T. R. 401; *Maysey v. Carnell*, Id. 534; *Lepine v. Barratt*, 8 T. R. 223.

(b) *Pope v. Wyatt*, 15 East, 215.

(c) See *Mills v. Bond*, 1 Str. 399.

(d) *Salter v. Shergold*, 3 T. R. 573.

(e) R. H. 2 W. 4, r. 32, *ante*, 99; *Smith v. Innes*, 4 M. & Sel. 360; *Kitching v. Alder*, 1 Chit. Rep. 282; *Coles v. Gunn*, 8 Moore, 526, 1 Bingh. 424, S. C.

(f) *Garnett v. Heavyside*, Barnes, 63; *Hutchinson v. Hardcastle*, Id. 103.

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the sheriff. It is probable, however, that the Court would require, in this case, the same affidavit as is required upon the ordinary motion to stay regular proceedings against the sheriff, or upon the bail bond, upon payment of costs, as mentioned *post*, 147.

If the plaintiff, without the knowledge of the sheriff, take a *cognovit* from the defendant for the payment of the debt by instalments, he cannot afterwards proceed against the sheriff (*g*); so, if the plaintiff, without the knowledge of the bail, take such a *cognovit*, he cannot afterwards proceed upon the bail bond (*h*); and where a plaintiff, with the consent of the bail to the sheriff, took a *cognovit*, with a stay of execution for a month, it was held, that, although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them, without giving them notice that the *cognovit* was unsatisfied: and proceedings taken without such notice were set aside (*i*). But after a bail bond has been forfeited, and an assignment thereof taken, time given to the principal will not discharge the bail, although given without their knowledge (*j*). Where time was given to the defendant, at the instance of one of the bail, the Court refused to set aside an attachment against the sheriff on the application of the bail (*k*).

Where the bail bond is put in suit contrary to good faith, the proceedings will be irregular, and set aside with costs (*l*).

If there have been any unnecessary delay in obtaining an attachment against the sheriff, the Court will, in general, set it aside; as, for instance, where the rule to bring in the body was served on the 19th November, and the attachment not sued out until the 9th of March, the Court set aside the attachment (*m*). So, where the rule was served in February, and the defendant had become bankrupt in March, and the attachment did not issue until the third of May, returnable the 4th, whereby the sheriff lost the opportunity of proving the debt under the commission, the Court set aside the attachment (*n*). But where the plaintiff, at the instance of the officer, forbore for ten days to enforce an attachment, the Court held that the sheriff was not discharged by this indulgence to his officer (*o*).

Perhaps, also, if, by any gross neglect any delay of the plaintiff in resorting to his remedy against the bail, the bail should be placed in a worse situation than they otherwise would have been, the Court might be induced to relieve the bail by setting aside the proceedings upon the bail bond (*p*).

The defendants having obtained an injunction staying the pro-

(*g*) *Rex v. Sheriff of Surrey*, in *Brewer v. Clarke*, 1 Taunt. 159.

(*h*) *Farmer v. Thorley*, 4 B. & Ald. 91; and see the cases as to how far it will be a discharge of bail above, *Croft v. Johnson*, 5 Taunt. 319, 1 Marsh. 59, S. C.; *Thomas v. Young*, 15 East, 617; *Bowfield v. Tower*, 4 Taunt. 456; *Melville v. Glendining*, 7 Id. 126; *post*, 428.

(*i*) *Clift v. Gye*, 9 B. & C. 422.

(*j*) *Woonnam v. Price*, 1 C. & M. 852.

(*k*) *Rex v. Sheriff of Middlesex*, in

*Bradley v. Waddell*, 1 D. & R. 388.

(*l*) *Sweeting v. Weaver*, 11 Price, 734.

(*m*) *Rex v. Perring*, 3 B. & P. 151.

(*n*) *Rex v. Sheriff of Surrey*, in *Morris v. Duffield*, 9 East, 467; and see *Rex v. Sheriff of Surrey*, 7 T. R. 452.

(*o*) *Pople v. Wyatt*, 15 East, 215. See *Rex v. Sheriffs of London*, in *March v. Russell*, 1 D. & R. 163.

(*p*) See *Heath v. Astley*, Barnes, 61; *Davenport v. Wall*, Id.; see *ante*, 137.

ceedings will not excuse the [redacted] from obeying the rule or order to bring in the body; and, in case of disobedience thereto, he is liable to an attachment (q).

If the defendant die before the eight days inclusive after the execution of the writ have expired, the Court will set aside the proceedings against the sheriff or upon the bail bond, and perhaps with costs, if the plaintiff knew of the death at the time he proceeded; but if he die after those eight days have expired, the Court will not relieve the sheriff, if he were in contempt at the time of the death (r), although they will, in many cases, relieve the bail under similar circumstances. As to the bail, in such a case:—If the defendant die before the time to which the plaintiff's judgment (supposing him to have proceeded in the original action and obtained judgment) would have related, and either before or pending an action against the bail, the Court, upon application, will set aside the proceedings against the bail, upon payment of costs (s), and, perhaps, without costs, if the plaintiff knew of the death when he commenced his action against them; but if the death do not happen until after the time to which such judgment would have related, then the Court will not relieve the bail, but upon payment of the debt and costs in the original action, to the extent of the penalty of the bond and the costs of the action against the bail (t), unless the delay of not proceeding in the original action be attributable to the laches of the plaintiff (u).

If the plaintiff die, and the action be thereby abated:—If he die before the eight days inclusive after the execution of the writ have expired, the Court will set aside proceedings against the sheriff or on the bail bond (x), and, perhaps, with costs; but if he die after the expiration of such eight days, the Court will set aside proceedings on the bail bond, on payment of costs, if the plaintiff could not have had judgment in the original action, had he proceeded in it (y); but if he could have had judgment, then only on payment of debt and costs, as above mentioned (z). But the Court, it should seem, will not relieve the sheriff, where he is in contempt previously to the plaintiff's death. (*Vide supra*).

The bankruptcy of the defendant will not, it seems, discharge the bail (a). But if the defendant, or his bail, become bankrupt after the bond is forfeited, the plaintiff's demand, being proveable under the commission, is barred by the certificate (b). Where the defendant became bankrupt and obtained his certificate before any action commenced against his bail, the Court set aside the proceedings in such action (c). Perhaps the safer mode of proceeding for the bail in such a case would be to put in and justify bail, or render the defendant, and then apply in the ordinary way to stay the proceedings upon payment of costs. (*Vide infra*).

(q) *Rex v. Sheriff of Middlesex*, 1 Dowl. P. C. 454.

(r) *Rex v. Sheriff of Middlesex*, 3 T. R. 133.

(s) *Orton v. Vincent*, Cowp. 71.

(t) *Id.*; *Morley v. Carr*, Barnes, 112.

(u) See *Heath v. Astley*, Barnes, 61; *Davenport v. Wall*, *Id.* 62.

(r) *Hutchinson v. Smith*, 8 Mod. 240.

(y) *Willoughby v. Rhodes*, Barnes, 71.

(z) *Nutkins v. Wilkin*, Barnes, 96.

(a) *Woolley v. Cobb*, 1 Bur. 244, 1 Ken. 504, S. C.; *Tidd*, 9th ed. 305.

(b) Cowp. 25; and see *Dinsdale v. Eames*, 2 B. & B. 8, 4 Moore, 350, S. C.

(c) *Sanders v. Spincks*, Barnes, 105.



If the defendant be an alien, and ~~be~~ out of the kingdom under the alien act before the eight days inclusive after the execution of the writ have expired, the Court, upon application, will order the bail bond to be cancelled (*d*), or set aside proceedings against the sheriff (*d*).

The proceedings cannot, it seems, be set aside, or the bail bond cancelled, on the ground of the plaintiff's attorney having neglected to take out his certificate. (*Ante*, 24).

If the plaintiff sue out two writs into two counties, and arrest the defendant who gives bail to the sheriff in both, the plaintiff may regularly proceed on the first bail bond (*e*).

It is not necessary to put in bail to the original action before making the application to set aside the proceedings for irregularity or for being against good faith; though it is so before making the application to set aside proceedings which are regular (*f*).

*Staying regular proceedings, upon payment of costs.*] The cases we have hitherto considered are those in which, either from irregularity or other cause, the plaintiff ought not to have commenced or continued proceedings against the sheriff or bail. But even in cases where such proceedings are perfectly regular, and have been properly commenced and continued, the Court exercise a discretionary power to stay them upon certain terms, in order to let in a trial of the merits. This power, with respect to proceedings upon bail bonds, is given to the Court by stat. 4 & 5 Ann. c. 16, s. 20, which enables them to afford, by rule, "such relief to the plaintiff or defendant in the original action, and to the bail, as is agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to the bail bond;" and in analogy to this, the Court have adopted a similar practice with respect to proceedings against sheriffs. The terms upon which such proceedings, either against sheriffs or upon bail bonds are stayed, are these: If the plaintiff have not lost a trial, the proceedings are stayed upon payment of the costs incurred by the plaintiff by such proceedings (*g*), and, if necessary, that the defendant shall receive a declaration, plead issuably, and take short notice of trial; but if the plaintiff have lost a trial, the attachment shall remain in the office, or the bail bond stand as a security for the debt and costs in the original action, if the plaintiff should have a verdict (*h*), even although the bail should have rendered their principal (*i*), unless the delay have arisen from the plaintiff's own laches (*k*). A trial may, it seems, be considered as lost in cases where the plaintiff has declared *de bene esse*, and has been prevented, from want of special bail being perfected in due time, from entering his cause for trial

(*d*) *Postell v. Williams*, 7 T. R. 517.

(*e*) *Bullock v. Morris*, 2 Taunt. 67; *Powell v. Henderson*, 1 Chit. Rep. 392.

(*f*) *Heath v. Gurley*, 4 Moore, 149, post, 147.

(*g*) See *Key v. Hill*, 2 B. & Ald. 598, 1 Chit. 337, S. C.

(*h*) *R. H. 2 W. 4*, r. 5; *Hill v. Bolt*, 4 T. R. 352; *Gravett v. Williams*, Id. note (*n*); *Callan v. Tye*, 2 H. Bl. 235; *R. M. 8 A. r. 1*, (*c*); 2 Saund. 61 *e*; *Res*

*v. Wettenhall*, 5 Taunt. 606; *Merryman v. Carpenter*, 2 Str. 1262; *Standen v. Blakie*, 13 Price, 114.

(*i*) *Whitehead v. Phillips*, 2 B. & Ald. 585, 1 Chit. Rep. 270, S. C.; *Hodge v. Hopkins*, 1 Dowl. P. C. 431.

(*k*) *Hutchinson v. Harcourt*, Barnes, 103; and see *Id.* 61, 62; *Pigott v. Trustee*, 3 B. & P. 221; *Merryman v. Carpenter*, 2 Str. 1262.

in a town cause, in the term next after the term, or the vacation of the term in which the writ is executed; and, in a country cause, at the ensuing assizes. (*See R. H. 2 W. 4, r. 5*). And in order to entitle the plaintiff to have the attachment or bail bond stand as a security, according to the above rules, he must have declared *de bene esse* (*l*). If the bail bond be thus ordered to stand as a security, the plaintiff may, by the rule of *H. T. 2 W. 4, r. 29*, sign judgment on it; so that he need not as formerly proceed to trial thereon: and the bail should therefore take care, before agreeing that the bail bond shall stand as this security, to ascertain that they have no defence to the action on the bond. If the bond is thus to stand as a security, the plaintiff may, if the declaration on the bond be not already delivered or filed, prepare the same, and sign judgment thereon without further calling on the defendant to plead, first entering an appearance for the defendant, if the defendant has not already appeared.

By *R. M. 59 G. 3*, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall, (if made on the part of the original defendant), be grounded on an affidavit of merits; or (if made on the part of the sheriff, or bail, or any officer of the sheriff,) be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail (*m*), or officer of the sheriff (as the case may be), at his or their own expense (*n*), and for his or their only indemnity, and without collusion with the original defendant (*o*). Upon an application to set aside an attachment, the affidavit must be intitled, "The King against the Sheriff of —, in a cause of — against —;" to set aside proceedings on the bail bond, it is intitled in the original action, or in the action on the bail bond (*p*). The affidavit of merits above mentioned must state positively that the defendant has a good defence to the action "upon the merits (*q*)."  
It seems, that though the motion be made on behalf of the bail, yet the affidavit need not state on whose behalf it is made, if it state that there is a good defence upon the merits (*r*). If the affidavit be defective, the Court will perhaps give time to produce a further one (*s*).

*Previously to the making of this application, you must either put in and perfect bail in the original action (t) (and the notice of bail in*

(*l*) *Rex v. Sheriff of Middlesex*, 1 Dowl. P. C. 454.

(*m*) *Merryman v. Quibble*, 1 Chit. Rep. 127.

(*n*) *Rex v. Sheriff of Middlesex*, 1 Dowl. P. C. 419.

(*o*) See the form of this affidavit, where the application is made upon the part of the defendant, Chit. Forms, 63, 65; where the application is made on the part of the bail to the sheriff, Id. 64, 66; on the part of the sheriff's officer, Id.; on the part of the sheriff, Id.; and see the form of an affidavit shewing that the plaintiff has lost a

trial, Id. 67.

(*p*) See *Leyles or Lines v. Chetwood*, 1 Dowl. P. C. 321, 10 Law J. 79, S. C.; 4 T. R. 688, 689; *Kelly v. Wrother*, 2 Chit. Rep. 109; *Roberts v. Giddins*, 1 B. & P. 337.

(*q*) M. S. E. 1822. *Grottick v. Bailey*, 5 B. & Ald. 703, 1 D. & R. 155, S. C.; *Rex v. Sheriff of Middlesex*, 1 Dowl. P. C. 398.

(*r*) *Bell v. Taylor*, 1 Chit. Rep. 572.

(*s*) *Merryman v. Quibble*, 1 Chit. Rep. 127.

(*t*) *Heath v. Gurley*, 4 Moore, 149; where the proceedings were irregular, Id.

that case must be, that the defendant will put in and perfect bail on such a day (u), unless bail have been put in already, in which case the notice will be a notice of justification only), or render the defendant (x). The plaintiff may then oppose the justification of the bail, without its being a waiver of the bail bond (y). Immediately upon the rule's being made absolute, get an appointment on it from the Master, serve a copy of it on the plaintiff's attorney, tax your costs (z), and pay them without delay, otherwise the rule or order will not operate as a stay of proceedings; and then plead to the action. Where the defendant in such a case pleaded the general issue, and afterwards a plea of bankruptcy *puis darrein continuance*; as the affidavit upon which the proceedings on the bail bond were set aside did not state that the application was made on the part of the bail, the Court in one instance set aside the latter plea, and restrained the defendant to his plea of the general issue, upon the ground that when the proceedings were stayed in the action upon the bail bond, it was intended that the defendant should only question the validity of the original debt (a). It has, however, been since decided, after the proceedings have been stayed generally on payment of costs, that the defendant may plead his bankruptcy in the original action (b). But he cannot plead in abatement (c).

The application may be made at any time. It has been granted even after execution sued out and executed against the bail (d). It may be made on the same day the bail justified (e).

It may be necessary to observe, that when the proceedings are against the sheriff, the Court will on no account relieve him, if it appear that he has been guilty of a breach of duty, as by letting the defendant out of custody without taking from him such a bail bond as is required by the statute (f); and this, whether the application be made on the part of the sheriff, or the defendant (g).

If the attachment be not set aside, the sheriff can be discharged from it only by payment of the whole debt and costs in the original action, to the extent of the penalty of the bail bond (and not merely the sum sworn to and costs (h)), and also the costs of the attachment, &c. (i). The sheriff after thus being obliged to pay the debt and costs, may put the bail bond in force against the bail, in order to reimburse himself; but in general the sheriff is reimbursed by the offi-

(u) *Boldero v. Gray*, Cowp. 769.

(z) *Whitehead v. Phillips*, 2 B. & Ald. 585.

(y) *Boldero v. Gray*, Cowp. 769.

(e) *Key v. Hill*, 2 B. & Ald. 598, 1 Chit. Rep. 337, S. C.

(d) *Dowson v. Levi*, 4 B. & Ald. 249.

(b) *Sainsbury v. Gandon*, 3 Mau. & Ry. 16.

(c) *Anon.* 2 Salk. 519.

(d) *Lepine v. Barratt*, 8 T. R. 223; and see *Gregory v. Gurlon*, Barnes, 74.

(e) *Shaw v. Johnston*, 2 Chit. Rep. 108.

(f) *Rex v. Sheriff of Surrey*, 7 T. R. 239; *Rex v. Sheriffs of London*, in *Todd v. Jacob*, 2 B. & Ald. 354; and see *Fuller*

*v. Prest*, 7 T. R. 109; *R. v. Lever*, Barnes, 34; *Birn v. Bond*, 6 Taunt. 554; *Hootson v. Tindal*, 1 Bing. 156; *Rex v. Sheriffs of London*, in *Lazarus v. Tanner*, 9 Moore, 422, 2 Bing. 227, S. C.; *Vanderhaden v. Britten*, 4 D. & R. 155; *ante*, 127.

(g) *Rex v. Sheriffs of London*, in *Todd v. Jacob*, 2 B. & Ald. 354.

(h) *Rex v. Sheriff (late) of Devon*, 1 B. & Adol. 159; *Heppel v. King*, 7 T. R. 370; *Rex v. Sheriff of Middlesex*, 3 East, 604; *Rex v. Sheriffs of London*, 9 East, 316; *Fowlds v. Mackintosh*, 1 H. Bl. 233.

(i) See *Rex v. Sheriffs of London*, in *Holler v. Clark*, 2 B. & Ald. 192.

cer, and the latter then sues upon the bail bond in the sheriff's name. The sheriff or officer cannot, after paying the debt and costs, maintain an action against the defendant for money paid (*k*). But an action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on an attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant having promised to indemnify the officer both before and after the payment: though the officer cannot recover beyond the debt (*l*).

So, if the proceedings upon the bail bond be not set aside or stayed, the bail can be discharged from it only by payment of the whole debt and costs in the original action, (and not merely the sum sworn to and costs), to the extent at least of the bail bond (*m*), together with the costs of the action against the bail. Where several actions, however, are brought against the bail and principal, without sufficient reason for so doing, on application to stay the proceedings, the Court or a Judge may stay them in all the actions, upon payment of the costs in one. (*R. H. 2 W. 4, r. 30*) (*n*). The application, however, should be made in a reasonable time, and at all events before verdict (*o*). In taxing the costs on staying proceedings on the bail bond, the master generally acts on the authority of this rule, and he may allow the costs in one action only.

## SECT. 8.

### Special Bail.

1. *Bail put in and justified in Town*, 170 to 175.
2. *Bail put in in the Country*, 175 to 179.
3. *Bail put in and justified, when the Defendant is in Custody*, 179 to 183.
4. *Paying Money into Court in lieu of Bail*, 180 to 182.

#### 1. *Bail put in and justified in Town.*

*What and in what cases requisite.*] Special bail, (or bail above, as they are sometimes termed) are persons who undertake generally that if the defendant be condemned in the action, he shall satisfy the costs and condemnation, or render himself to the custody of the marshal, or that they will do it for him (*p*).

The bail must consist of two persons at least; where the debt is large, the Court or a Judge will allow three or four persons to become

(*k*) *Plecher v. Bailey*, 8 East, 171.

(*l*) *White v. Leroux*, 1 M. & M. 347.

(*m*) *Stevenson v. Cameron*, 8 T. R. 28; *Jackson v. Hassell*, Doug. 330; *Orton v. Vincent*, Cowp. 71; *Mitchell v. Gibbons*, 1 H. Bl. 76; and see *Austen v. Fenton*, 1 Taunt. 23.

(*n*) See *Key v. Hull*, 2 B. & Ald. 598, 1 Chit. Rep. 337, S. C.

(*o*) *Johnson v. Macdonald*, 2 Dowl.

P. C. 44.

(*p*) As to how far the bail are liable, see post, 415. If bail are put in after judgment, their recognizance is taken in double the amount of the sum recovered. (*Post*, 154). Formerly, if the action was by bill, the bail undertook generally, as they now do, if by original, they undertook in a sum certain.

bail in different sums, amounting together to the requisite sum (*q*); where the defendant was poor and was arrested for 700*l.*, the Court granted a rule for three bail to justify instead of two (*r*); and there is also an instance of the Court having allowed one bail to justify for 4,000*l.*, and two other bail for 2,000*l.* each, the sum for which bail was required being 4,000*l.* (*s*). And in some cases where the arrest is for a very large sum, even six or eight persons have been allowed to become bail (*r*).

When the defendant has been arrested, and is afterwards at large on bail bond or otherwise, special bail must be put in; or, in lieu of such special bail, the defendant, if he has made a deposit with the sheriff under the 43 G. 3, c. 46, s. 2 (*ante*, 126), must allow that sum, and pay 10*l.* additional as a security for costs to remain in Court, and enter a common appearance; or, if he has not made such deposit with the sheriff, he must, in lieu of such special bail, pay the sum indorsed on the writ with 20*l.* as a security for costs into Court, and enter a common appearance, (*see* 7 & 8 G. 4, c. 71, *post*, 180); there being no other way in which the defendant's appearance in court in a bailable action can be effected: and if special bail be not put in, or the money be not so allowed to remain, or be not so paid into Court in due time, the plaintiff, if a bail bond have been taken, has the option either of taking an assignment of it and proceeding thereon against the bail, or of proceeding against the sheriff in order to compel an appearance; or if a deposit have been made with the sheriff, he may take the money out of Court, and afterwards proceed in the action, if he think proper, upon entering a common appearance for the defendant; or if no bail bond have been given, or deposit made, he may proceed against the sheriff either by action as for an escape, or by ruling him to return the writ and bring in the body.

But if the defendant, after he is at large on bail bond or otherwise, surrender himself to the sheriff, within the eight days after the arrest, inclusive of the day of arrest, and the sheriff accept of the surrender (*u*), he is then considered to all intents as having continued in the sheriff's custody since the caption, and no action can afterwards be brought upon the bail bond (*v*); nor can the plaintiff compel an assignment of it (*w*); and if any proceedings be taken against the sheriff, he may return the writ, &c. &c. in the same manner as if the defendant had never been out of his custody (*x*).

There are also some acts of the plaintiff which, in contemplation of law, amount to a waiver upon his part of special bail; such as the delivery of a declaration absolutely before bail is put in, (*R. M.* 8 A. r. 1), demanding or accepting a plea after a declaration *de bene esse*, and before bail put in (*y*), and the like.

*Who may be bail.]* As to who may become bail will be found

(*q*) It cannot be done without such leave; *see Anon.* 13 Price, 448. See form of affidavit. Chit. Forms, 68.

(*r*) *Easter v. Edwards*, 1 Dowl. P. C. 39.

(*s*) 1 Sellon, 159; *Jell v. Douglass*, 1 Chit. Rep. 601.

(*u*) *Hamilton v. Wilson*, 1 East, 383.

(*v*) *Plimpton v. Howell*, 10 East, 100.

(*w*) *Stamper v. Milbourne*, 7 T. R.

122; *Jones v. Lander*, 6 Id. 753.

(*x*) *See Jones v. Lander*, 6 T. R. 753.

(*y*) *Law v. Stevens*, 1 Dowl. P. C. 425, *Lister v. Wainhouse*, Barnes, 92.

treated of *post*, 168, 169, while treating of the grounds for opposing the justification of bail. It may be here noticed that where an attorney, knowing that bail were insufficient, put them in, and gave notice of justification, the Court held him personally responsible for the costs of the opposition (*z*).

*By whom put in.*] Bail is usually put in by the defendant or his attorney. But it may be put in by the sheriff (*a*), or by the bail to the sheriff (*b*), for their indemnity; or by an attorney, in pursuance of his undertaking (*c*). No objection can, it seems, be taken to bail on account of their having been put in by an uncertificated attorney (*ante*, 24). It is usual for the attorney, employed by the sheriff or his bail to put in and justify bail above, to describe himself as the attorney for the defendant in the notice, though not actually employed by him (*d*). It seems questionable whether bail can be put in by a new attorney without an order for changing the other attorney (*e*). Where two notices were given by different attorneys, one for the defendant and the other for the sheriff of two different sets of bail, and the bail put in for the sheriff had already justified, the defendant was held entitled to have his bail justified and allowed (*f*).

*When put in.*] Bail may, it seems, be put in by the defendant after the writ issued, although no arrest has taken place or bail bond given, so as to protect the sheriff; though, indeed, it has been said they cannot be so without plaintiff's consent (*g*). It *must* be put in within eight days after the arrest of the defendant, inclusive of the day of such arrest (*h*). If the last of these days fall on a Sunday, the defendant has all the Monday following to put in bail (*i*); and so, if the last of the days be Christmas day, Good Friday, or a day appointed for a public fast or thanksgiving, the defendant has all the following day to put them in. (*See R. H. 2 W. 4, reg. VIII.*) And it seems that if the last of these days fall on any day between the Thursday before, and the Wednesday next after, Easter day, then the Wednesday next

(*z*) *Blundell v. Blundell*, 5 B. & Ald. 533, 1 D. & R. 142, S. C.

(*a*) *Peake*, 169; *Wheeler v. Rankin*, 1 Chit. Rep. 81, Id. 329, 5 Price, 558, but see *Taylor v. Evans*, 8 Moore, 398, 1 Bing. 367, S. C.

(*b*) *Berchere v. Colson*, 2 Str. 876; *see Rex v. Sheriffs of London*, in *Plomer v. Houghton*, 2 B. & Ald. 604; *Haggett v. Argent*, 7 Taunt. 47, 2 Marsh. 365, S. C.; *Birt v. Roberts*, 1 M. & M. 177, 178, n. In the Common Pleas, the sheriff may, even after he is in contempt for not bringing in the body, put in bail to surrender the defendant without his consent, and although the original bail piece is on the file. *Hamilton v. Jones*, 6 Bing. 628.

(*c*) *See Rogers v. Reeves*, 1 T. R. 418, 422, *ante*, p. 39.

(*d*) *Gilmour v. Brindley*, 7 D. & R. 259.

(*e*) *Anon.* 2 Chit. Rep. 87; *Malper-son's bail*, Id. 93; *ante*, 37; *post*, 155, 163, 164; but see *Anon.* Id. 76.

(*f*) *Wheeler v. Rankin*, 1 Chit. Rep. 81.

(*g*) *See Chit. Sum. Prac.* 42; *Barnes*, 43; *Imp. C. P.* 170; *Hyde v. Whiskard*, 8 T. R. 457; *Evans v. Sweet*, 9 Moore, 556, 2 Bing. 271, S. C.

(*h*) *See the form of the writ of capias, ante*, 96. Formerly, bail must have been put in, if the arrest were in London or Middlesex, within four days after the return of the process, whether by bill (R. M. 8 A. r. 1) or by original; or within six days, if the arrest were within any other county. (R. M. 8 A. r. 1). *See Coulson v. Hammon*, 2 B. & Cres. 626, 4 D. & R. 160, S. C.; *Moses v. Norris*, 4 M. & S. 397.

(*i*) *See R. M. 8 A. r. 1, (b); Studley v. Sturt*, 2 Stra. 782.

after Easter day will be considered as the last of the eight days. (*See ante*, 59, *sed quære*.) Bail may be put in on a *dies non juridicus*, provided it be not a Sunday (*k*). They may be put in at any time pending the suit, to release the defendant if a prisoner (*l*), or to make one of the former bail a witness (*m*), and this, even at the trial (*n*). They may be put in even after verdict (*o*), or after final judgment, and before defendant is charged in execution (*p*); but bail will not, in general, be allowed to justify after defendant has been brought up to be charged in execution in the cause (*q*).

If, under the rule of *T. T. 1 W. 4*, the defendant have given notice (*r*) of justifying bail at the time they are put in, and the plaintiff has given notice of his being desirous of inquiring after the bail, then (unless otherwise ordered by the Court or a Judge) the time for putting in and justifying bail will be postponed and proceedings stayed, until the expiration of the time required by the plaintiff's notice. (*R. T. 1 W. 4, r. 1, post*, 173). The plaintiff must not, however, by such notice require more than three days' time to inquire of the bail in case of town bail, and six days in the case of country bail, and such notice must be served at least one day before the time appointed for putting in and justifying the bail. (*Id.*)

As regards the time for putting in and perfecting bail, where a rule for staying the proceedings has been obtained, if the rule should be discharged, the defendant has not then, it seems, as much time for such putting in and perfecting as he had at the time he obtained the rule, but (if not already done), he has only the whole of the day on which the rule is disposed of to put in or perfect, &c. bail (*s*). It should seem, therefore, that the defendant should either put in and perfect bail pending the rule *nisi*, stating that he does so without prejudice, and not serve the rule for the allowance of bail till after the rule *nisi* has been disposed of; or (which would be preferable), should, on affidavits of facts and of the rule *nisi*, obtain an order that, in case the rule shall be discharged, he shall have time for putting in and perfecting bail, until three days after the rule *nisi* has been disposed of, without prejudice to such rule, and on terms of placing the plaintiff in the same situation as if bail had been perfected in the ordinary time (*t*).

If you wish an extension of the time for putting in bail, you may, in general, obtain it upon a Judge's summons (returnable before the time for putting in bail has expired), and consenting that the plaintiff shall be put in the same situation as if bail had been put in in due time (*u*). It is usual, however, to accompany this summons with an

(*k*) *Baddoley v. Adams*, 5 T. R. 170.

(*l*) *Tidd*, 9th ed. 279.

(*m*) *Young v. Wood*, Barnes, 69; *Anon.* 2 Chit. Rep. 103.

(*n*) *Baillie v. Hole*, 1 M. & M. 289.

(*o*) *Dyott v. Dunn*, 2 Chit. Rep. 72, 1 D. & R. 9, S. C.; *Todd v. Etherington*, 2 Marsh. 375.

(*p*) *Stanton's bail*, 2 Chit. Rep. 73; *Davis v. Fowler*, *Id.* 74.

(*q*) *Bircham v. Chambers*, 11 Moore, 343.

(*r*) See form of notice, Chit. Forms, 72.

(*s*) *St. Hanlairs v. Byam*, 4 B. & Cres. 970, 7 D. & R. 458, S. C.; and see *Glover v. Watmore*, 5 B. & Cres. 769, 8 D. & R. 607, S. C.

(*t*) See Chit. Sum. Pract. 325, note; and see the form, Chit. Forms, 72.

(*u*) See *Joyce v. Pratt*, 6 Bing. 377.

affidavit of the facts, shewing why you want the time required—such as the dangerous illness of the defendant, or his sudden unavoidable absence preventing his attorney from ascertaining from him the names of his proposed bail, or the like.

*How put in.*] Bail may be put in before a Judge in town, a commissioner in the country, or a Judge of assize in his circuit. It is put in usually at the chambers, but sometimes at the house of one of the Judges of the Court; and is put in either *absolutely* (which cannot, however, be done without the consent of the plaintiff or his attorney, and which is not very usual in practice), or *de bene esse*, (that is, conditionally), subject to the plaintiff's afterwards approving of or excepting to them. Bail in an action in this Court is thus put in: *Engross a bail piece on a plain piece of parchment, stating the day on which the bail is put in, and the county into which the writ upon which the defendant was arrested issued, and the names of the parties, together with the names and additions of the bail and the sum sworn to (x); you may procure a printed form at the stationer's. Take it to the Judge's chambers; and, having the bail with you, apply to the Judge's clerk, who will thereupon take the bail (y); pay him 4s. in term, 5s. in vacation. In this Court, and in the Court of Common Pleas, the bail do not sign the bail piece, as they do in the Court of Exchequer. Leave the bail piece at the Judge's chambers, where it remains until the bail are perfected.*

The bail piece must state the day of the month and year on which the bail is put in. It must also state the county, as in the writ upon which the defendant was arrested; (*R. M. 4 W. 4*); and if there be any mistake in this respect, the bail will be deemed irregularly put in (*z*). Where the bail piece was not intitled of the Court or in the cause (*a*), or it did not appear thereby that the person before whom the bail was taken was a commissioner (*b*), time was given to cure the defect. The names of the parties must also be stated correctly (*c*); and the Court have refused to amend an error in such a case, without the consent of the bail (*d*); but they have allowed it where the bail were rightly named in the notice of bail, the bail reacknowledging their obligation (*e*), and, on an error in this respect, they will allow the bail to justify a second time (*f*). If the defendant have been arrested by a wrong name, the bail piece should state his right name, and that he was sued by the name in the writ; for if bail be put in by the name in the writ, the defendant will afterwards be estopped by it in that action from taking any advantage of the misnomer (*g*). But where the plaintiff sued out a writ against the defendant in his wrong name, the *præcipe* being right, and the defendant put in bail in his right name, the Court set

(x) See the form, Chit. Forms, 69.

(y) See form of the recognizance, Chit. Forms, 69.

(z) *Smith v. Miller*, 7 T. R. 96. See *Res v. Sheriff of Middlesex*, in *Bridger v. Smith*, 3 M. & Sel. 532.

(a) *Hail's bail*, 1 Chit. Rep. 79.

(b) *Simmons' bail*, 1 Chit. Rep. 9.

(c) See *Holt v. Frank*, 1 M. & Sel.

199; *Fenton v. Ruggles*, 1 B. & P. 356.

(d) 1 Barnard. 214.

(e) *Anderson v. Noah*, 1 B. & P. 31. *Croft v. Cogges*, 4 Moore, 65.

(f) MS. E. T. 1814.

(g) See ante, 100; *Hole v. Finch*, 2 Wils. 393; *Smithson v. Smith*, Willes, 462; *Barnes*, 94; *Meredith v. Hodges*, 2 New Rep. 453.



aside an attachment obtained against the sheriff for not bringing in the body, but without costs on either side (*h*); and where the defendant was named in the notice of bail by his right name, as having been sued by a wrong one, but in the bail piece he was called by the wrong name only; this was deemed sufficient (*i*). The bail piece must also state correctly the sum sworn to; but the Court have allowed an amendment in this respect, where it appeared clearly to have arisen from a mistake (*j*). If the bail piece is defective, it is a ground for opposing the bail.

Where bail is put in *after* judgment, the recognizance is taken in double the amount of the sum recovered (*k*).

*Notice of putting in bail.*] When bail are thus taken *de bene esse*, the defendant's attorney should give a written notice thereof to the attorney of the plaintiff, without delay, (*R. M.* 16 C. 2), and before the time for putting in bail has expired, in order to prevent an assignment of the bail bond. It is no bail until such notice has been given. The notice may be given *before* the bail are put in. And in cases where you intend justifying the bail at the time of putting them in, (as you may do under the rule of *T. T.* 1 W. 4, r. 4), you must give four days' notice of such putting in the bail, previously, before eleven o'clock in the morning, and exclusive of Sunday. Where you do not intend so justifying the bail at the time of putting them in, then it is not usual to give the notice until after they are put in (*l*).

This notice must be intituled "*In the King's Bench*," and also intituled correctly in the cause (*m*). It must not be a notice of more than *two* bail, unless by order of the Court or a Judge, otherwise it will be irregular; (*R. II.* 2 W. 4, r. 18) (*n*); and if the Court or Judge so order it, the rule or order should be served before, or at the time of the notice. It must set forth, with truth and certainty, the names of the bail (*o*), and their addition of degree or mystery (*p*). A schoolmaster (*q*), or clerk in the Custom House (*r*), may be described as a gentleman. A "shopkeeper" is, in general, a sufficient description (*r*), but a "manufacturer" is not (*t*). If a false addition be given to the bail, as, for instance, "gentleman," where the person was a baker, or Scotch ale agent, or the like (*u*); or, if the bail be not styled "the younger," where he and his father are of the same name (*w*), the notice will be defective. But even where the names, &c. had, by mistake, been omitted altogether, the Court held, that the notice of bail could

(*h*) *Bostell v. Atkins*, 2 Chit. Rep. 56.

(*i*) *Anon.* 2 Chit. Rep. 81.

(*j*) *Faget v. Vanthiennen*, Barnes, 59.

(*k*) *Hill v. Stanton*, 2 Chit. Rep. 73; Tidd, 9th ed. 251.

(*l*) See the forms of notices in either case, Chit. Forms, 71, 72.

(*m*) Loft, 237; 2 Chit. Rep. 77, 81. As to what is an improper title in an affidavit, see *post*, Vol. 2, 899, 900.

(*n*) See form of affidavit, &c. for leave to put in more than two bail, Chit. Forms, 68, Chit. Sum. Prac. 319.

(*o*) Loft, 187.

(*p*) Id. 281, 187; *Anon.* 6 Mod. 24; *Anon.* 11 Mod. 2; *Wood v. Chadwick*, 2 Taunt. 173; — *v. Costar*, 5 Id. 554.

(*q*) — *v. Pasman*, 5 Taunt. 759.

(*r*) *Anon.* 1 Chit. Rep. 494, n.

(*t*) *Fearnley's bail*, 1 Dowl. P. C. 40.

(*u*) *Wood v. Chadwick*, 2 Taunt. 173; Loft, 281, 187; *Anon.* 1 Chit. 494, n.; *Darcey's bail*, Id. 76; *Moss v. Heavyside*, 9 D. & R. 772; *Flemming's bail*, 1 C. & M. 111, 1 Dowl. P. C. 641, S. C.; *Hamlet's bail*, 1 Id. 501.

(*w*) *Smith v. Mellon*, 5 Taunt. 854, 1 Marsh. 386, S. C.

not, therefore, be treated as an absolute nullity (*x*). In addition to these descriptions of the bail, by the rule of *T. T. 1 W. 4, r. 2*, it is ordered, that the notice also mention the *street, or place, and number* (if any), where each of the bail *resides*, and all the streets, or places, and numbers (if any), in which each of them has been resident at any time *within the last six months*, and whether he is a *housekeeper or freeholder* (*y*). This rule must be strictly complied with. A notice that the bail had, "*within the last six months*, (instead of *for the last six months*), *resided*," &c. is not sufficient (*z*). And the actual, and not the mere constructive, residence of the bail must be stated (*a*). The residence of a bail is sufficiently described by stating it to be at a place well known, as a village, without mentioning any street in it (*b*). The notice is sufficient if it state the residence of the bail for the last six months, without going on in express terms to state that the bail has resided there for that period (*c*). If the bail has had two places of residence, during the *whole* of the six months, one only of them need be mentioned in the notice (*d*), the object of this part of the rule being to trace the party for six months in one residence. This rule and form of notice must be complied with, notwithstanding there be an affidavit of the sufficiency of the bail accompanying it (*e*); but, it seems, that a mistake in the notice, in the description of the residence of the bail may sometimes be cured by the affidavit of their sufficiency, if that be correct (*f*). If the bail to the sheriff have become bail above, it was usual to state that circumstance in the notice of bail; but this seems now unnecessary. Notice of bail, as put in before one Judge, when, in fact, they were put in before another, is irregular (*g*).

The notice should regularly be given by the attorney for the party who puts in the bail. In a case, however, where an attorney, appointed by the bail to the sheriff, also put in and gave notice of bail, and proceeded to justification, this was holden to be regular, although the defendant's attorney had also given notice of bail, and there was no order to change the attorney (*h*).

The notice should be served either upon the plaintiff's attorney personally, or upon some clerk or servant in his office. If he cannot be met with, and his office be not open, it will suffice to stick up a copy of the notice in the King's Bench Office, and put another under the attorney's door (*i*); and leaving the notice at a stationer's, where the plaintiff's attorney's papers are usually left for him, has been

(*x*) *Pugh v. Emery*, 4 D. & R. 30.

(*y*) See the cases decided before this rule, in *Weddall v. Berger*, 1 B. & P. 325; — *v. Costar*, 5 Taunt. 554, *Rickman v. Haices*, 5 Taunt. 173.

(*z*) *Johnson's bail*, 1 Dowl. P. C. 438; *Ward's bail*, Exch. 12th Nov. 1832, 1 Dowl. P. C. 596, 1 C. & M. 28, S. C.

(*a*) *Thomson v. Smith*, 1 Dowl. P. C. 340.

(*b*) *Smith's bail*, 1 Dowl. P. C. 499.

(*c*) *Anon.* 1 Dowl. P. C. 160; *Fenton v. Warre*, 2 C. & J. 54, 2 Tyr. 158, 1

Dowl. P. C. 295, S. C.

(*d*) *Anon.* 1 Dowl. P. C. 159.

(*e*) *Id.* 160.

(*f*) *Ward's bail*, Exch. 5 Leg. Obs. 63, 1 C. & M. 28, 1 Dowl. P. C. 596, S. C.; and see *Higg's bail*, 1 *Id.* 124.

(*g*) *Kelly v. Wrother*, 2 Chit. Rep. 109.

(*h*) *Rex v. Sheriffs of London*, in *Plover v. Houghton*, 2 B. & Ald. 604; *ante*, 37, 151; *post*, 163, 164.

(*i*) *Atkinson v. Thompson*, 2 Chit. Rep. 81; *Anon.* *Id.* 39.

deemed sufficient service (*j*) But service on the master of a house in which the attorney had an office, is not, it seems, sufficient, unless some privy be shewn to exist between them (*k*). The service must be made before nine o'clock at night; (*R. M.* 41 *G.* 3; *R. H.* 2 *W.* 4, *r.* 50); and though received and read after that hour, it is not available even as a notice of the next day (*l*).

If the notice of bail be in any respect defective, or the service of it irregular, it will afford a ground for opposing the justification; but in general, a defect in the notice will not make it a nullity, so as to admit of the plaintiff's taking an assignment of the bail bond, &c. and, unless it has misled the plaintiff's attorney, the Court will frequently give time to correct it or serve a fresh notice (*m*).

*Affidavit of sufficiency accompanying notice of bail.*] If the defendant be provided with good and sufficient bail, then, for the purpose of giving the plaintiff an opportunity of inquiring into their sufficiency, and avoiding expense and trouble to both parties, the defendant may (*n*), by the rules of *T. T.* 1 *W.* 4, *r.* 3, and *H. T.* 2 *W.* 4, *r.* 19, accompany the notice of putting in the bail with an affidavit of each of the bail, and which, after being intitled in the Court and in the cause, should be as follows: "*A. B.*, one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper [or freeholder as the case may be] residing at [describing particularly the street or place, and number, if any], that he is worth (post, 157) property to the amount of £ [the amount required by the practice of the Courts] over and above what will pay (*p*) all his just debts; [if bail in any other action, add and every other sum for which he is now bail;] that he is not bail for any defendant except in this action, [or if bail in any other action or actions, add, except for *C. D.* at the suit of *E. F.* in the Court of in the sum of £ ; of *G. H.* at the suit of *I. K.* in the Court of in the sum of £ ; specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail;] that the deponent's property, to the amount of the said sum of £ , [and, if bail in any other action or actions, of all other sums for which he is now bail as aforesaid,] consists of [here specify the nature and value of the property, in respect of which the bail proposes to justify, as follows:—*Stock in Trade, in his business of* , carried on by him at , of the value of £ ; of good Book Debts owing to him to the amount of £ ; of Furniture in his house at , of the value of £ ; of a Freehold or Leasehold Farm, of the value of £ , situate at , occupied by , or of a Dwelling House of the value of £ , situate at , occupied by ;" or of other property, particularizing each description of property, with the value thereof;] and that the deponent hath for

(*j*) *Anon.* 2 Chit. Rep. 82; *Thompson's* bail, *Id.* 87.

(*k*) *Freeman's* bail, 2 Chit. Rep. 88.

(*l*) *Anon.* 2 Chit. Rep. 88.

(*m*) *Fearnley's* bail, 1 Dowl. P. C. 40; *Bell v. Foster*, 8 Bingh. 374, 1 Dowl. P. C. 271, S. C.; *Wallace v. Arrowsmith*, 2

*B. & P.* 49; *Pugh v. Emery*, 4 D. & R. 30; *Rex v. Sheriff of Middlesex*, in *Duncombe v. Crisp*, 1 C. & M. 482, 2 Dowl. P. C. 5, S. C.

(*n*) See *Anon.* 1 Dowl. P. C. 115.

(*p*) *The R. H.* 2 *W.* 4, *r.* 19, seems to require these words—"what will pay."

the last six months resided at [describing the place or places of such residence.]”

*Either the original, or a copy of this affidavit, must accompany the notice of bail, otherwise it would not be proceeding according to the above rules (q). If it be a copy, as is most usual, then head it with the word “copy,” or else refer to the original in some other way, by the notice of bail or otherwise (q).*

Though the form of affidavit thus prescribed is several, it may nevertheless be made jointly by the bail (s). And the affidavit will in general be sufficient, if the prescribed form of it be substantially though not literally pursued (t). The above form, as prescribed by the rule of *T. T. 1 W. 4, r. 3*, requires the bail to swear that they are “possessed of” the property; but the later rule of *H. T. 2 W. 4, r. 19*, requires that they shall swear that ~~they~~ they are “worth” it, and if they do not, the affidavit will be insufficient (u). If the affidavit merely describe the bail as “possessed of money in the funds,” without stating in what fund the money is, the Court or a Judge would, if the plaintiff required it, give him time to inquire further as to the bail (x). If a bail has had two residences during the whole of the six months mentioned in the affidavit, one only of them need be mentioned, the object of this part of the affidavit being to enable the plaintiff to trace the bail for six months in one residence (x). An affidavit of sufficiency by *country bail*, purporting to be according to the above form, and not containing all its requisites, is good, if it be sufficient according to the old form noticed *post*, 176.

If the plaintiff afterwards *except* to the bail making this affidavit, and the bail be allowed, he will have to pay the costs of the justification, (*R. T. 1 W. 4, r. 3*); unless the Court otherwise order, and which they will do if the affidavit be not according to the above rules (y), or there be such a defect or indefinite description in the notice of bail or justification (z), as to justify the plaintiff in compelling a justification, or the Court or a Judge to give him time to inquire after the bail. If, on the other hand, the bail be rejected, the defendant will have to pay the costs of opposition, unless the Court or a Judge thereof otherwise order.

*Accepting of, or excepting to bail.*] If the plaintiff, or his attorney

(q) *West v. Williams*, 1 Dowl. P. C. 162, 3 B. & Adol. 345, S. C.

(s) *Anon.* 1 Dowl. P. C. 115.

(t) *Perry's bail*, MS. Exch. 12th Nov. 1832, 1 Dowl. P. C. 606, S. C. *Henshaw v. Woolwich*, 1 C. & J. 150. Where the bail swore “he is not bail for any,” without adding “other person,” it was held sufficient, *Smith's bail*, MS. and Nov. 1832, K. B., 5 Leg. Obs. 112, 1 Dowl. P. C. 514, S. C.

(u) *Hutchinson's bail*, 1 Dowl. P. C. 572, 2 C. & J. 487, S. C.; *Okill's bail*, 2 Dowl. P. C. 19; *Thompson's bail*, Id. 50; *Simpson's bail*, MS. 12th Nov. 1832, 1 Dowl. P. C. 605; *Jones's bail*, Exch.

11th January, 1833, MS. and 5 Leg. Obs. 240, in which case the Court granted the defendant time to cure the defect, and ordered the costs to be cost in the cause. *Henshaw v. Woolwich* 1 C. & J. 150; *Jervis's Rules*, 60, n.; *Rogers v. Jones*, 1 Dowl. P. C. 704. B. in *Woolton's bail*, E. T. 1833, Exch., *Gurney, B.*, said, that, in future, time would not be granted to cure it.

(z) *Anon.* 1 Dowl. P. C. 159.

(y) *Jackson's bail*, Id. 172.

(2) *Anon.* Id. 126. *Thompson's bail*, 12th Nov. 1832, K. B. MS., 5 Leg. Obs. 225.

or agent, consider the bail, of whom notice have been given, sufficient, he will proceed in the action as usual, and the bail will be considered as justified. If, on the other hand, he considers them or one of them insufficient, or the proceedings as to them irregular, he will then except to them, and for which purpose he will have to enter such exception, and give a notice thereof as mentioned below. He should, however, be cautious in making such exception, especially in cases where the notice of bail has been accompanied by an affidavit by each of the bail of their sufficiency, in pursuance of the rules of *T. T. 1 W. 4*, and *H. T. 2 W. 4*, ante, 156; for if the plaintiff in such case except to the bail, and they justify, he will in general, as we have just seen, ante, 157, have to pay the costs of the justification; and though the bail should be rejected, he might, if the Court or Judge so ordered it, have to pay his own costs of the exception.

If the defendant has given the four-day notice that he will put in and justify the bail at the same time, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules noticed ante, 156, and post, 162, (provided they are to be so put in in due time), the plaintiff must, if he be desirous of excepting to and opposing the bail, give notice of and enter his exception to them at all events one day before the time for so putting in and justifying the bail (or before the further time, if any, required by and allowed to plaintiff for inquiry into the bail,) has expired, otherwise they will be considered as justified (b). If the defendant has given such notice of justifying bail at the time of putting them in, but has not accompanied the notice with such affidavits by them of their sufficiency, then the plaintiff need not, it seems, give any notice of his excepting to them, and they must justify, and plaintiff may oppose such justification at the time appointed. If the defendant has not given such notice of justifying bail at the time of putting them in, then the plaintiff is at liberty to except to the bail at any time within twenty days after the service of the notice of bail, and if he do not except to them within that time, they will be considered as accepted and justified (c). If the twentieth day happen to fall on a Sunday, then the exception may be made on the Monday. It is not necessary or indeed usual to except to added bail, if the original bail have been excepted to, for they must justify whether excepted to or not (d). And generally, if bail be not put in

(b) Some doubt has been entertained in the profession, as to the meaning of the rule of *T. T. 1 W. 4*, r. 4; the words of the rule are, "that, if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without further justification than such affidavit." It is to be observed, that the rule, in its wording, is extended to all cases in which such affidavit of the sufficiency of the bail is made; but this could hardly be deemed the intention of it; for, even before the rule, it was in all cases, (except in the cases expressly mentioned in the above text, and in the case of bail for a prisoner,

&c.), necessary to except to the bail, in order to compel a justification. It is submitted, that the meaning of the rule is as stated in the text, and that it is confined to cases where the defendant has given notice of justifying the bail at the time of putting them in, and has accompanied such notice with the affidavit of sufficiency. The rule does not apply to bail for a prisoner, nor to any case where notice of exception is not necessary. *Webb's bail*, 1 Dowl. P. C. 446.

(c) See *Oldham v. Burrell*, 7 T. R. 26, *Guddard v. Davis*, 9 Bingh. 83, 1 Dowl. P. C. 278, S. C.; and *R. M. 8 A. r. 2*.

(d) *Gregory v. Gurdun*, Barnes, 74.

in due time, they must afterwards justify, whether excepted to or not (e). When the bail are put in in proper time, and notice thereof given, they should be excepted to and notice of such exception given to defendant's attorney before the sheriff is ruled (f). But if they are not put in at the time of ruling the sheriff, he must put in and perfect bail at his peril, or render the defendant in four days in a town cause, or six days in a country cause, without any exception; for otherwise, if the plaintiff excepted, the sheriff would have four days after exception to perfect bail, and by that means would have more than the time allowed him by the practice of the Court to return the writ and bring in the body (g). *To render the exception of any avail, the plaintiff must, as we shall presently more fully notice, enter it in the bail book at the Judge's chambers, and afterwards give notice thereof to the defendant's attorney.*

There are some cases, where the plaintiff by his own act may have precluded himself from excepting to bail. Thus, if, after bail are put in and before exception, the plaintiff declare absolutely, and not merely *de bene esse* (h); or if, after declaring *de bene esse*, he demand or accept a plea (i); in these cases the plaintiff has waived all exception to the bail; and if he do except to them, the defendant may consider the exception a nullity. And formerly, if after the plaintiff had taken an assignment of the bail bond, the bail to the sheriff were put in as bail above, the plaintiff could not except to them; but now, by the recent rule of *H. T. 2 W. 4, r. 15*, he may except to them; and even before this rule, when an assignment of the bail bond was taken after exception, it was no waiver of the exception, but the bail were bound to justify (k).

It must be observed that the plaintiff's attorney, by not excepting to bail in time, is deemed to acquiesce in their sufficiency, and in the regularity of the proceedings; and therefore he cannot afterwards treat the bail as a nullity, and take an assignment of the bail bond, although the bail put in were attornies or attornies' clerks, or other persons not allowed to be bail by the rules of the Court (l).

If the plaintiff or his attorney accept of the bail, or, which is the same thing, if he do not except to them within the limited time after the service of the notice of bail, or is precluded from excepting to them, *the defendant's attorney may at once obtain the bail piece from the Judge's clerk, and file it with the signer of the writs (m).*

**Entering notice of exception.]** In order to except to bail, the first step is to enter such exception. The giving notice of exception,

(e) *Turner v. Cary*, 7 East, 607; *Fuller v. Prest*, 7 T.R. 109; *Boldero v. Gray*, Cowp. 769; *Nunn v. Rogers*, 2 Chit. Rep. 108.

(f) *Lofft*, 159; *Re v. Sheriff of Middlesex*, 8 T. R. 258.

(g) *Tidd*, 9th ed. 256.

(h) *R. M. 8 A. r. 2*; and see *Lister v. Wainhouse*, Barnes, 92, 1 Sel. 152.

(i) *Id.*; see *Re v. Sheriffs of London*, in *Marsh v. Russell*, 1 D. & R. 163; *Re v. Sheriff of Middlesex*, in *Halliday v.*

*Locke*, 4 Id. 835, post, 164.

(k) *Hill v. Jones*, 11 East, 321.

(l) *Bologne v. Vautrin*, Cowp. 828, 2 Doug. 467, n. S. C.; *Re v. Sheriff of Surrey*, 2 East, 181; and see *Huggins v. Bambridge*, Barnes, 81; *Bell v. Gate*, 1 Taunt. 162; but see *Fenton v. Ruggles*, 1 B. & P. 356; *Wallace v. Arrowsmith*, 2 Id. 49, cont.

(m) See *R. M. 16 C. 2*; *R. M. 8 A. r. 2*; 1 Sellon, 148, 149.

without actually entering the exception, is a mere nullity, and is not simply an irregularity which may be waived by the defendant's acting on the notice (n). In general, the exception must be entered in the bail book at the Judge's chambers (o), within twenty days after service of the notice of bail; (R. M. 8 A. reg. 2); and if the twentieth day happen to fall on a Sunday, the exception may be entered on the Monday (p). But, in cases where the defendant has given notice of justifying bail at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules of T. T. 1 W. 4, and H. T. 2 W. 4, ante, 156, post, 162, then it seems the plaintiff must, if he be desirous of excepting to them, enter his exception one day or more before the time of so putting and justifying them has expired. Not only must the exception be entered, but notice also of the exception must be given within the time limited for such entry. (Vide infra). All this, however, must be understood as applying to bail put in in due time (q); for if bail be put in after the time limited for doing so, they must afterwards justify, whether they are excepted to or not (r).

After entering the exception, notice of it must be given to the defendant's attorney, (R. M. 8 A. reg. 2, R. E. 2 G. 2), otherwise the entry itself will be of no avail (s): and, on the other hand, if notice of exception be given, but no exception be actually entered, it will be a mere nullity, and not simply an irregularity which may afterwards be waived by the defendant's acting on the notice (t). In general, this notice must be given within twenty days after the service of the notice of bail or the exception will be void, and the bail need not justify (u). In cases where the defendant has given notice of justifying bail at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules ante, 156, post, 162, then it seems the plaintiff must, if he be desirous of excepting to them, give notice of such exception one day or more before the time of putting them in and justifying them has expired. (See R. T. 1 W. 4, reg. 3, 4). The notice must be in writing, a verbal notice is not sufficient (x). It must be intitled in the cause (y). But if merely a verbal notice (z), or no notice whatever be given (a), or if there be any other irregularity in the notice or service of it, yet if the defendant afterwards give notice of justification, he thereby waives the defect or irregularity (b). If the exception be made in vacation, and you are desirous that the bail should

(n) *Thwaites v. Gallington*, 4 D. & R. 365; *Hodson v. Garrett*, 1 Chit. Rep. 174; and see *Rogers v. Mapleback*, 1 H. Bl. 106.

(o) *Rex v. Sheriff of Middlesex*, 5 B. & Cres. 389, 8 D. & R. 149, S. C.

(p) See form of the entry, Chit. Forms, 47.

(q) See *Gould v. Holmstrom*, 7 East, 580, 3 Smith, 575, S. C.

(r) *Turner v. Cary*, 7 East, 607; *Fulmer v. Prest*, 7 T. R. 109; *Boldero v. Gray*, Cowp. 769.

(s) *Oldham v. Burrell*, 7 T. R. 26; *Rex v. Sheriff of Middlesex*, 5 B. & Cres. 389,

8 D. & R. 149, S. C.

(t) *Thwaites v. Gaunton*, 4 D. & R. 365; *Hodson v. Garrett*, 1 Chit. Rep. 174.

(u) *Oldham v. Burrell*, 7 T. R. 26; R. H. 2 W. 4, r. 25.

(x) *Cohn v. Davis*, 1 H. Bl. 80; *Rex v. Sheriff of Middlesex*, 5 B. & Cres. 389, 8 D. & R. 149, S. C.

(y) *Rex v. Sheriff of Middlesex*, 1 Chit. Rep. 741; *Anon.* Id. 374.

(z) *Cohn v. Davis*, 1 H. Bl. 80.

(a) *Rogers v. Mapleback*, 1 H. Bl. 106.

(b) See form of the notice, Chit Forms, 74.

justify before a Judge at chambers, you should state this in the notice of exception, otherwise they need not be justified until the *first* day of the next term. (*R. H. 2 W. 4, r. 17*) (c).

*Adding bail.*] Formerly, before the time for justification expired (*vide post*, 162), if the bail already put in did not mean to justify, others might be added as of course, within the time allowed for their justification; and if there was not sufficient time for that purpose, then the defendant might have taken out a summons and procured an order for further time. But now, by the rule of *T. T. 1 W. 4, r. 5*, the bail of whom notice has been given cannot be changed, without leave of the Court or a Judge. But, on proper occasions, such leave will be given. And if, after notice of putting in bail, or of putting in and justifying bail, or of justifying bail, and before the day appointed for justifying, the defendant discover that one or both of the bail will not be able to justify, either on account of insufficiency of property or illness, &c. (d), the defendant should immediately, and without any delay, procure other bail, and make an affidavit of the facts, and apply to the Court for a rule, or to a Judge for a summons (e), for leave to add another or two other bail, and, if necessary, for time to justify the same, and for a stay of proceedings till the time given by the Court or Judge shall have expired. A copy of the affidavit, and of the summons, should immediately be delivered to the plaintiff's attorney, and, when justice requires, the Court or Judge will make an order. If the time will not allow an earlier application, then it must be made to the Judge at the time appointed for the justification of the original bail, but when it can be made sooner it ought (f). In any case you should take care that the summons be returnable before the time for justifying bail has expired; and such summons will be a stay of proceedings (g). In a late case, where the agent for the defendant had not time to communicate with his principal in the country, so as to obtain the names of good bail, the Court of Exchequer allowed the bail to be changed upon payment of costs, and putting the plaintiff in the same situation as if good bail had been put in in the first instance (h). But the circumstance of the defendant not having procured sufficient bail because he expected the cause would be settled, is not sufficient to allow of the changing the bail (i). After this leave is obtained, add the names and additions of the added bail on the back of the bail piece at the Judge's chambers (j); or you may do it at Westminster the morning you justify, if you intend then obtaining leave of the Court to add bail; and for this purpose you should get the bail piece from the Judge's clerk the evening before. Pay 2s. each for the added bail, and pay the Judge's clerk for the bail piece 2s. 6d. It may be necessary to mention that if one or both of the bail who came up to justify be rejected for insufficiency, the bail piece becomes a nullity for this purpose; and you cannot afterwards add new bail upon it; but if you

(c) See Tidd's Pract. 9th ed. 260.

(d) See the instances where time will be given, *post*, 171; and see forms of affidavits, Chit. Forms, 75, 76.

(e) See form, Chit. Forms, 76.

(f) See Chit. Sum. Prac. 329.

(g) *Redford v. Edie*, 6 Taunt. 240.

(h) *Whitehead v. Minn*, 2 C. & J. 54.

(i) *Orchard v. Glover*, 9 Bingh. 318.

(j) See the form, Chit. Forms, 78.



would proceed to a justification of bail, you must give a new notice of putting in and justifying them (*k*). It is not necessary to give a four-day notice of putting in added bail (*l*). As to the notice of justification of added bail, *see post*, 163.

When bail are added, the Court, upon application, will order an *exoneretur* to be entered on the bail piece as to the former bail, at any time before a *scire facias* is brought against them (*m*); or even after *scire facias* the Court will stay proceedings against them (*n*), or allow an *exoneretur* to be entered *nunc pro tunc* (*n*), upon payment of costs.

It is not necessary, or indeed usual, to *except* to added bail, if the original bail have been excepted to; for they must justify whether excepted to or not (*p*); and for this reason the notice of their being added is always included in the notice of justification.

*Notice of justification of bail.*] The defendant may, if he chooses, justify bail at the same time at which they are put in, provided he give a four days' previous notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. (*R. T. 1 W. 4*) (*q*). This notice must be framed and served in the same manner as a notice of justification in other cases presently noticed, or the bail may in general be successfully opposed for a material defect in it. If in the notice of bail their residences for the last six months be stated, it is not necessary to repeat it in the notice of justification. If the plaintiff in this case be desirous of time to inquire after the bail, and shall give one day's notice thereof to the defendant, his attorney, or agent, before the time appointed for justification, stating therein what further time is required, (such time not to exceed three days in the case of town bail, and six days in the case of country bail), then (unless the Court or a Judge shall otherwise order), the time for putting in and justifying bail will be postponed accordingly, and all proceedings be stayed in the mean time. (*R. T. 1 W. 4, r. 1*).

In other cases (where you do not purpose justifying bail at the same time at which they are put in), it should be premised that the bail must justify within four days after notice of exception, if the notice be given in term time; (*R. E. 5 G. 2, r. 1*); or if the notice of exception be given in vacation, and the notice require the bail to justify before a Judge, they must justify within four days from the time of such notice, otherwise on the first day of the ensuing term, (*R. H. 2 W. 4, r. 17*): and these rules apply, even although the defendant may have put in bail before the time allowed him for that purpose had expired (*r*). But after a rule to bring in the body, the defendant has the same time to justify as the sheriff has to bring in the body, namely, four days in town, and six in country cases (*s*).! *Notice of justification must be*

(*k*) *Lewis v. Gadderer*, 5 B. & Ald. 704, 1 D. & R. 350, S. C.

(*l*) *Perry's bail*, 2 C. & J. 475, 1 Dowl. P. C. 564, S. C.

(*m*) *Tubb v. Tubb*, Say. 58, 309.

(*n*) *Fulke v. Bourke*, 1 W. Bl. 462; *Humphry v. Leite*, 4 Bur. 2107.

(*p*) *Gregory v. Gurdon*, Barnes, 74.

(*q*) This rule does not seem affected by that of *R. H. 2 W. 4, r. 16*. (*Post*, 163). *Jenkins v. Maltby*, 2 C. & J. 124.

(*r*) *Seaver v. Spraggon*, 2 N. R. 85.

(*s*) *Whittle v. Oldaker*, 7 B. & C. 478, 1 M. & R. 298, S. C.; but see *Ladd v. Arnaboldi*, 1 C. & J. 97, *semble contra*, in Exchequer.

given accordingly. If the four days expire on the last day of the term, and the bail do not justify before the rising of the Court on that day, the plaintiff may take an assignment of the bail bond the same evening and proceed upon it (t), or move for an attachment against the sheriff, at the rising of the Court, if the rule to bring in the body have expired. (*Ante*, 137). It should also be observed, that if you are to give notice to justify on the last day of the time limited for justification, and that day happen to be a holiday on which the Court do not sit, you must, notwithstanding, give notice for the holiday, in order to prevent an assignment of the bail bond, and the bail may justify on the day after as a matter of course (u).

As to the *time of service* of the notice of justification in these cases where you do not purpose justifying the bail at the time of putting them in, if the bail *originally* put in and excepted to intend to justify, *one* day's notice of justification must be given to the plaintiff's attorney, as, on Saturday for Monday, Tuesday for Wednesday, &c.

If bail are *added*, unless otherwise ordered, there must be *two* days' notice of justification; as Thursday for Saturday, Saturday for Tuesday, (Sunday not being reckoned), &c.

In all cases, except where you do not intend justifying bail at the time of putting them in, a *two* days' notice of justification will suffice (*R. II. 2 W. 4, r. 16*).

The notice of justification, whether of the bail originally put in, or of added bail, must be *served before eleven o'clock in the forenoon of the day on which it is required to be given according to the practice of the Court*. (*R. T. 59 G. 3*). But bail, justifying under a rule or order for time, do not, it seems, come within this rule. *The service should be made in the same manner as the service of a notice of bail already pointed out, ante, 155 (v)*.

As to the form of the notice of justification, it must be properly intituled in the cause; therefore, where it was in the name of one only of two plaintiffs, it was holden bad (w). It must not be of more than *two* bail, unless by leave of the Court or a Judge, otherwise it will be irregular; and if the Court or a Judge so order it, you should serve the rule or order on the plaintiff's attorney or agent, before or at the time of the service of the notice of justification. The notice should, it seems, contain the christian and surnames of the bail (x); but it need not state their *addition* or places of abode, unless it be a notice of justification of added bail (y). In an action against several, it is no objection to the notice of justification, that it states the bail will justify for three, bail for two only having been put in. (*R. H. 2 W. 4, r. 18*) (z). Before this rule a notice that *three* would justify was good (a); but not so a notice that A, B, and C, or *two* of them, would justify (b).

(t) *Dent v. Weston*, 8 T. R. 4.

(u) Tidd, 9th ed. 260; Imp. B. R. 173.

(v) *Fowler's bail*, 1 Chit. Rep. 78.

(w) Loft, 237; *Anon.* 2 Chit. Rep. 77.

(x) *Taylor v. Halliburton*, 1 Chit. Rep. 351, n. See *Richardson v. Mellish*, 9 Moore, 579.

(y) *England v. Kerwan*, 1 B. & P.

335; and see *Higg's bail*, 1 Dowl. P. C. 124. *Aliter* in C. P.; see *R. M. 7 G. 4, 4 Bingh. 51*. See the forms of notices of adding and justifying added bail, Chit. Forms, 76, 77.

(z) *Denton's bail*, 1 Dowl. P. C. 2. (a) Loft, 252; but see *Allen v. Keyt*, 2 W. Bl. 1122, *contra*.

(b) Loft, 26.

Care must be taken that the notice of justification be given by the same attorney that gave the notice of bail, (unless, in the mean time, the defendant have obtained an order to change his attorney); otherwise the bail will not be allowed to justify (c). But where the defendant's attorney refused to proceed to the justification, the Court allowed the bail to appear and justify by their own attorney (d). So, where the defendant's attorney gave notice of bail, and the bail to the sheriff by their attorney gave notice of adding and justifying other bail, the Court held it to be sufficient (e).

By giving notice of justification, the defendant waives every defect in the notice of exception, and any irregularity in the service of it (f).

*Justification, when, how, &c.]* If the defendant, or his attorney, has given notice of justifying the bail at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules, ante, 156, 158, then, unless the plaintiff has given notice of, and entered, his exception to them, at all events, one day before the time for so putting in and justifying the bail has expired, they will be considered as justified. If the defendant has given such notice of justifying bail at the time of their being put in, but has not accompanied the notice with such affidavit by them of their sufficiency, then they must justify at the time appointed, whether excepted to or not. In other cases where the defendant has not given such notice of justifying the bail at the time of putting them in, but has put the bail in in due time, the bail must justify within the time limited for that purpose, (see ante, 162), if they be excepted to, but not otherwise. When bail are not put in in due time, they must justify, whether they are excepted to or not (ante, 158, 159).

There are certain acts of the plaintiff, which are deemed a waiver of justification; such as delivering a declaration absolutely before a justification, (*R. M. & A. r. 1: Id. r. 2*), or demanding or accepting a plea, after a declaration *de bene esse*, and before justification (h). So, although a demand of a plea is in general a waiver of justification, yet where further time is given to justify, upon the usual terms of putting the plaintiff in the same situation, &c., and the plaintiff demands a plea before the bail have actually justified, this has been holden not to be a waiver of the justification (i). Formerly, where bail to the sheriff became bail above, and the plaintiff had taken an assignment of the bail bond before exception, the necessity for a justification was deemed waived; but this is now otherwise, and they must justify if excepted to. (*Ante*, 159; *R. H. 2 W. 4, r. 15*).

If the bail do not justify within the time limited for that purpose, and no further time be given, they are out of Court, and the bail

(c) *Marpherson v. Rorison*, 1 Doug. 217; *Kaye v. De Mattos*, 2 W. Bl. 1323; *Hill v. Roe*, 2 Marsh. 257, 6 Taunt. 532, S. C.

(d) *Haggett v. Argent*, 7 Taunt. 47.

(e) *Rez v. Sheriff of London*, in *Plover v. Houghton*, 2 B. & Ald. 604; and see ante, 37, 151, 155.

(f) *Rogers v. Mapleback*, 1 H. Bl. 106; *Cohn v. Davis*, Id. 80; and ante, 160.

(h) *Lister v. Wainhouse*, Barnes, 92; *Law v. Stevens*, 1 Dowl. P. C. 425.

(i) *Rez v. Sheriff of Middlesex*, in *Halliday v. Locke*, 4 D. & R. 835; *Rez v. Sheriff of London*, in *Marsh v. Russell*, 1 Id. 163.

bond may be assigned (h). The Court in such a case, will, upon application, order their names to be struck out of the bail piece (i); but whilst their names remain on the bail piece, they are still considered bail for the purpose of rendering their principal (j).

The bail must justify in *open Court*, or before a *Judge at chambers*; and they may, either in term or vacation, justify before a Judge at chambers, or in some other convenient place, to be appointed by him; and this, whether defendant be in custody or not. (1 W. 4, c. 70, s. 12) (k).

Before a Judge at chambers, bail are thus justified: *As the bail piece remains at the Judge's chambers, let the bail accompany you there, and the Judge's clerk will swear them, and take their recognizance. Pay him 2s. in term, 4s. in vacation.*

In Court, bail are thus justified: *The evening before, desire the Judge's clerk to bring the bail piece into Court, and he will accordingly do so, and deliver it to the master; or the Judge's clerk will give you the bail piece, and you may deliver it the next morning to the master in Court; pay the Judge's clerk 2s. 6d. If the bail piece be not in Court the bail cannot justify. Make an affidavit of service of the notice of justification, with a copy of the notice annexed (l). If you have accompanied the notice of bail with an affidavit by the bail of their sufficiency, according to the rules, ante, 156, then let the affidavit of service of the notice of justification also state that fact, and let a copy of the notice of bail and the affidavits of sufficiency be annexed (m). The affidavit should state how the service was made (n); and must be properly intitled (o). If the service of the affidavit was originally defective, but was rendered sufficient by the plaintiff's attorney having acknowledged the receipt of it, or by his having consented to waive the improper service, or otherwise, then let the affidavit state the facts accordingly (p). Give the affidavit to counsel, with a motion paper indorsed to "move to justify the within bail," who will move it accordingly. Attend at Westminster with the bail, and they will be called in their turn, and sworn; and if they be allowed to justify, pay the officer 9s. They will be allowed to justify, as a matter of course, unless opposed. The Bail Court is in Westminster Hall, at Westminster; and one of the puisne Judges (see the 1 W. 4, c. 70, s. 1) of the Court of King's Bench attends there every morning before ten o'clock, (R. T. 35 G. 3; H. 46 G. 3), usually at*

(h) *Hardwick v. Bluck*, 7 T. R. 207; *Dent v. Weston*, 8 T. R. 4, 2 Saund. 61a.

(i) *Humphry v. Leite*, 4 Bur. 2107; *Jones v. Tubb*, 1 Wils. 337; Say. 58; *Fulke v. Bourke*, 1 W. Bl. 462.

(j) MS. E. 1817; R. II. 2 W. 4, r. 20; and see *Rex v. Sheriff of Essex*, 5 T. R. 633.

(k) Agreeably to this statute, a rule was made in the Exchequer "that all special bail shall be justified, within four days after exception, before a Baron at chambers, as well in term as in vacation." (R. M. 1 W. 4, r. 11, s. 16; 1 C. & J. 281; 1 Tyr. 163). But by a subsequent rule of that Court, (R. II. 1 W. 4, 1 C. & J. 385; 1 Tyr. 251), "justification of bail in term time, shall, un-

less by consent, take place as heretofore, in open Court; and the justification of bail before a Baron at chambers, shall be confined to cases of consent, and to justification in vacation."

(l) See the form, Chit. Forms, 79.

(m) Id. 80.

(n) *Yates's* bail, 1 Chit. Rep. Id. 43, 77.

(o) *Hayward's* bail, 1 Chit. Rep. 1. Where the notice of justification was served, and affidavit of service thereof was made by different attorneys, without a rule to change the former attorney, the bail were rejected. *Anon.* 2 Chit. Rep. 87.

(p) See forms, Chit. Sum. Prac. 334.

half-past nine, for the purpose of taking the justification of bail, and continues to sit until all the bail have justified. The bail should be in attendance at the Court by half-past nine in the morning, and if bail be not ready and papers delivered to counsel by ten o'clock, no bail is to be taken after that hour. (*R. T. 35 G. 3; R. H. 46 G. 3; R. H. 59 G. 3*). Where there are but few bail, the bail must be very punctual, for, if not ready, the Judge will not wait even till ten o'clock; but when bail are numerous, the exact time of their attendance is not usually inquired into; and sometimes the Judge has even returned to the Court *ex gratia*, to prevent expense and inconvenience, to receive the justification when the bail have attended immediately after the rising of the Court, at or before ten o'clock; and, under particular circumstances, after the rising of the Judge in the Bail Court, the full Court have, on the same day, granted a rule for justifying bail on a subsequent day, with a stay, in the mean time, of any proceedings, so as to prevent an assignment of the bail bond, or attachment against the sheriff: and such an indulgence may now be obtained on motion to the single Judge in the morning (*q*). On the last day of term bail may justify at the rising of the Court.

Each of the bail must swear that he is a housekeeper or freeholder (*r*), and worth double the sum sworn to, after his just (*s*) debts are paid. Where the sum sworn to, however, exceeds 1000*l.*, it is required only that he should justify for 1000*l.* more; (*R. M. 51 G. 3*); as, if the sum sworn to be 1500*l.*, each of the bail must justify for 2500*l.* We shall hereafter notice how the plaintiff may act if the bail be guilty of perjury or prevarication, &c., *post*, 175.

*Opposing the justification of bail.*] Bail are allowed to justify, as a matter of course, unless opposed; and it may be necessary to mention, that, by opposing them, you do not waive any right you may have of proceeding afterwards upon the bail bond (*t*), or against the sheriff (*u*). If you intend to oppose the justification, *deliver a brief to counsel for that purpose, and he will oppose them, either by examining them, after they are sworn, as to any matter of objection you may have suggested in the brief, or as to the matters of any affidavit with which you may have furnished him, (which must first, however, be given in to the clerk of the papers, and read) (w), or by shewing some defect in the notice of bail or justification, or some irregularity in the service of it.* If an affidavit be used against bail, it must set forth the particular objections intended to be relied on against them; merely stating matters of report and general opinion will not suffice (*x*). The bail may be asked questions respecting their qualifications as housekeepers or freeholders, and the nature and extent of their property to the extent of the sum for which they are required to be answerable, but no further; and questions are not allowed to be asked which will unnecessarily expose the circumstances of bail, or of other persons (*y*). The counsel who moved to justify the bail may, before the

(*q*) Chit. Sum. Prac. 56.

(*r*) *Per Cur.* M. T. 10 G. 4, C. P., after conference with all the Judges, *post*, 168.

(*s*) *Anon.* 2 Y. & J. 101.

(*t*) *Boldero v. Gray*, Cowp. 769.

(*u*) *Williams v. Waterfield*, 1 B. & P. 334.

(*w*) *Anon.* 1 Chit. Rep. 373, n.

(*x*) *Sanderson's bail*, 1 Chit. Rep. 676; *Williams v. Hunt*, Id. 321.]

(*y*) Tidd, 9th ed. 274.

Judge has finally decided against admitting the bail, interpose and put questions to them, tending to remove any *prima facie* objections, and may prevent the opposing counsel from pressing improper questions (z). If bail be opposed in two actions, they must be opposed in each separately (a). A mistake of counsel, in omitting to oppose in time, will not be a ground for being afterwards permitted to examine them (b).

The usual grounds of opposition to bail are as follow:

1. That there is some defect in the notice of bail; as, that it is not correctly intituled in the Court or cause; (*see ante*, 154); or that it contains a notice of more than two bail; or that the names or additions of the bail, or their places of abode, are omitted, or not stated with truth or with sufficient certainty, or that they are not described as housekeepers or freeholders; (*see ante*, 154, 155) (c); for the notice of bail must be framed with such a reasonable degree of certainty, as will render it very improbable that the plaintiff shall not be able to find out the residences of the bail, and make his inquiries as to their sufficiency, or that he shall mistake them for other persons. But it seems that, in the Court of Common Pleas, any uncertainty in the description of the bail in the *notice of bail*, is cured by the plaintiff's excepting to them (d).

2. That there has been some irregularity in the service of the notice of bail. (*See ante*, 155).

3. That there is some defect in the notice of justification (*ante*, 162); and it must be observed, that when a notice of added bail is contained in the notice of justification, their additions and places of abode must be stated with the same certainty, &c. as in the notice of bail; and the notice of justification in such a case is consequently liable to the same objections.

4. That there has been some irregularity in the service of the notice of justification; as that it was not served in time, or served after nine o'clock at night, or the like. (*Ante*, 163, 155).

There is not, in general, much use in making any objection upon the grounds stated in these four preceding objections; if you have found the bail, so as to be able to make inquiries as to their responsibility, the Court will, in general, overlook the objection altogether, though they will not allow the defendant the costs of justification (e); or if you have been misled by the notice, &c., so as not to be able to make such inquiries, the Court will give you time for that purpose, and order the bail to attend to justify at another time, or else order the defendant to give a fresh notice (f), the defendant in either case being generally ordered to pay the costs of the first attendance of the plaintiff to oppose the bail, and also in the event of the bail being afterwards rejected, the costs of the second attendance to oppose them.

5. That no bail bond has been taken, and that an action for an escape has been brought against the sheriff (g).

(z) Chit. Sum. Prac. 59. See form of affidavit to oppose bail, Chit. Forms, 80.

(a) Anon. 2 Chit. Rep. 94.

(b) Butler's bail, 1 Chit. Rep. 83; Waterhouse's bail, Id. 573, n.; Hawkins v. Wilson, 4 Taunt. 666; but see Addison v. Foster, 2 Chit. Rep. 98.

(c) Bell v. Foster, 8 Bing. 335.

(d) Bigg v. Dick, 1 Taunt. 17.

(e) De Bode's bail, 1 Dowl. P. C. 368.

(f) See Fearnley's bail, 1 Dowl. P. C. 40.

(g) Fuller v. Prest, 7 T. B. 109; Webb

6. That the bail are not housekeepers or freeholders. If they be, however, the amount of the rent of their houses or annual value of their freeholds is not material (*h*); nor is it necessary that they should be assessed to the poor's rate, &c. (*i*). A copyhold estate of the bail in right of his wife is not sufficient (*j*). Although, in one case (*k*), it has been decided that long beneficial leases, at small rents, were sufficient to entitle the bail to justify, yet it is now settled that no bail shall be allowed to justify unless he be a housekeeper or freeholder (*l*). The bail must be in actual possession of the whole or some main part of the house (*m*). If the bail be likely to become a housekeeper in two or three days, time to justify might be allowed (*n*). Being a housekeeper or freeholder in Scotland or Ireland will not suffice (*o*). The Court of Common Pleas have allowed a person to justify as bail in respect of a house kept by him and his partner, who carried on business therein, where the rent and taxes were paid by them jointly, and his partner resided in the house, though he lodged himself at a considerable distance therefrom (*p*); and where a person had taken a house occupied by several tenants or lodgers, from one of whom he had received rent, he was holden to be qualified to justify as bail, though he had not occupied the house himself (*q*). With the plaintiff's consent, persons who are not housekeepers or freeholders may justify (*r*).

7. That they are not worth double the sum indorsed on the writ (or if that sum exceed 1,000*l.*, then 1,000*l.* in addition to it) after payment of all their just debts; as, that they are uncertificated bankrupts; or have been bankrupts a second time, and have not paid 15*s.* in the pound under their second commission, or insolvent debtors, and have not paid 20*s.* in the pound on the debts inserted in their schedule (*s*). So counsel may examine them as to any circumstance of suspicion that may be suggested to him, such as their being unable to pay their rent, taxes (*t*), small debts, &c. It seems to be no objection of itself, however, that the bail is indorser of the bill of exchange upon which the action is brought against the defendant as acceptor (*u*). But it is an objection that he remains liable on outstanding dishonoured bills (*x*); and the acceptor of a dishonoured bill was, in a late case, held not competent to become bail in an action against the drawers (*y*).

Where the bail had suffered his children (*z*) or father (*a*) to receive parochial relief, he was rejected.

*v. Matthew*, 1 B. & P. 225; and see *Res v. Sheriffs of London*, in *Todd v. Jacob*, 2 B. & Ald. 354; *ante*, 148, 127.

(*h*) *Lofft*, 148.

(*i*) *Id.* 328.

(*j*) *Anon.* 2 Chit. Rep. 97.

(*k*) *Id.* 96.

(*l*) *Smith's bail*, 1 Dowl. P. C. 1; *et per Cur. M. T.* 10 G. 4, C. P., after conference with all the Judges; and *Anon.* 1 Dowl. P. C. 127.

(*m*) *Bold's bail*, 1 Chit. Rep. 288; *Anon.* *Id.* 6; *Walker's bail*, *Id.* 316; *Slade's bail*, *Id.* 502.

(*n*) *Bold's bail*, 1 Chit. Rep. 288.

(*o*) See *Anon.* 1 Dowl. P. C. 61.

(*p*) *Hemming v. Plenty*, 1 Moore, 529; *Savage v. Hall*, 1 Bing. 430, 8 Moore, 525, S. C.

(*q*) *Cohen v. Waterhouse*, 8 Moore, 365.

(*r*) *Saggers v. Gordon*, 5 Taunt. 174.

(*s*) See *Smith v. Roberts*, 1 Chit. Rep. 9.

(*t*) *Lewis v. Thompson*, *Id.* 300.

(*u*) *Harris v. Manley*, 2 B. & P. 526; *Mitchel's bail*, 1 Chit. Rep. 287.

(*x*) *Barnesdall v. Stretton*, 2 *Id.* 79.

(*y*) *Anon.* 1 Dowl. P. C. 183.

(*z*) *Anon.* 2 Chit. Rep. 77.

(*a*) *Holm v. Booth*, 2 *Id.* 78.

Where the bail did not know whether he had been arrested or not during the space of two years, he was rejected (*y*).

8. That they are foreigners, and have no property in this country (*z*). Yet a *native* of England has been allowed to justify, in respect of property partly in England and partly abroad (*a*).

Any person having privilege of parliament will not be allowed to justify, on account of his privilege from arrest (*b*); so, a person entitled to privilege as one of the servants in ordinary of the King (*c*), or a domestic servant of a foreign ambassador (*d*) will not be allowed to justify; and it has been doubted whether a person living within the verge of the palace shall be allowed to justify, particularly if there be suspicious circumstances in the case, such as his being much in debt or the like (*e*).

9. That they have been bail before, and know not in how many actions, or for what sums (*f*). A bail was rejected who had been bail to the sheriff in a former action and not excepted to, it appearing that his property was not sufficient for both actions (*g*).

10. That they have been before rejected as bail. There is a book kept by the Muster, containing the names of such bail as have been rejected for insufficiency, prevarication, or the like, and are not deemed proper persons to become bail; and that the name of the bail is inserted in this book, is in general considered so conclusive an objection to him, that the Court will not allow him to justify (*h*). Even where it was not discovered, until after bail had been opposed and allowed, that one of them had, on a former occasion, been rejected for insufficiency, the Court set aside the rule of allowance, although it appeared that he had since become a person of considerable property (*i*). But the Court will not extend this objection to cases clearly not within the reason of the rule; and therefore where the former rejection was merely on the ground of the bail being on that occasion indemnified by the defendant's attorney, the Court allowed him to justify (*k*).

11. That they do not know the defendant. This, however, is but a mere circumstance of suspicion, and may be satisfactorily explained (*l*).

12. That they are attornies of this or some other Court, (*R. H. 2 W. 4, r. 13, ante, 32, R. M. 14 G. 2, r. 1*) (*m*); or the clerks (whether

(*g*) *Newman's* bail, 2 Chit. Rep. 95.

(*z*) *Boddy v. Leyland*, 4 Bur. 2526; *Leyland's* bail, 1 Chit. Rep. 285; but see *Guichard v. Roberts*, 1 W. Bl. 444, 2 Id. 1323, 957; *Tidd*, 9th ed. 270.

(*a*) *Beardmore v. Phillips*, 4 M. & S. 173; *Graham v. Anderson*, Id. 371; and see *Tidd*, 9th ed. 246; 8 Taunt. 148. The distinction seems to be between *foreigners* and *British subjects*. The former are not allowed to justify in respect of property abroad, but the latter, under circumstances, may. See *Tidd*, 9th ed. 221; 1 Chit. Rep. 285, n.

(*b*) *Duncan v. Hill*, 1 D. & R. 126, 2 B. & B. 682, 5 Moore, 567, S. C.; *Graham v. Sturt*, 4 Taunt. 249.

(*c*) See *ante*, p. 65; *Anon.* 1 D. & R. 127.

(*d*) *Lock's* bail, 1 Dowl. P. C. 124.

(*e*) *Glead v. Mackay*, 2 W. Bl. 956.

(*f*) *Lofft*, 72, 194.

(*g*) *Varden v. Wilson*, 1 Chit. Rep. 297.

(*h*) See *Tidd*, 9th ed. 275; *Snell's* bail, 1 Chit. Rep. 42; though rejected in another court, *Monk's* bail, Id. 676.

(*i*) *Pickard v. Dobson*, 3 D. & R. 5; and see *Gould v. Berry*, 1 Chit. Rep. 143; *Waterhouse's* bail, Id. 307.

(*k*) — *v. Hallett*, 1 D. & R. 488.

(*l*) *Jameson's* bail, 2 Chit. Rep. 97; *Anon.* 1 Dowl. P. C. 1.

(*m*) *Doug.* 467, n., &c.



articled or not) of such an attorney; (*R. H. 2 W. 4, r. 13*) (*n*); and it makes no difference, that they are not the clerks of the defendant's attorney (*o*): the plaintiff may, indeed, if he chooses, treat such bail as a nullity, if they be practising attornies, or clerks of practising attornies. (*R. H. 2 W. 4, r. 13, ante, 32*). For the same reason, bail who have been indemnified by an attorney, are not allowed to justify (*p*), for this would be a mere evasion of the rule; but it is no objection that they are indemnified by any other person (*q*). Such indemnified bail, however, could not be treated as a nullity. In a late case bail was rejected where he was to receive a commission on the amount for which he proposed to justify (*r*).

13. That they are sheriff's officers, bailiffs, or other persons, concerned in the execution of process; (*R. M. 14 G. 2, r. 2*) (*s*); and this rule extends to Marshalsea Court officers, and all other officers having the execution of the process of any Court (*t*), and to the keeper of the Poultry Compter (*u*), and the like (*v*). For the same reason, bail who have been indemnified by a sheriff's officer, shall not be allowed to justify (*w*), for this would be a mere evasion of the rule.

14. That they have been in the pillory for perjury; and they may be asked this question, (*x*). It is no objection that the bail is a gaming-house keeper (*y*).

15. That they have been outlawed after judgment (*z*).

*Costs of opposition.*] By *R. H. 1822*, "whenever two or more notices of justification of bail shall have been given before the notice on which the bail shall appear to justify, no bail shall be permitted to justify, without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or one of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared or shall have been rejected" (*a*). It is therefore now immaterial whether there have been any change of bail or not, although formerly it was otherwise; if there have been three notices of justification, the plaintiff is entitled to his costs, before the bail are permitted to justify. In practice, it is usual in such a case to deposit a sum of

(*n*) 1 H. Bl. 76, 2 Id. 350.

(*o*) *Redit v. Broomhead*, 2 B. & P. 564; *Bozon v. Falconer*, M.S. E. 1824.

(*p*) *Greensill v. Hopley*, 1 B. & P. 103; *Preston v. Bindley*, Tidd, 9th ed. 289; *Anon.* 1 Dowl. P. C. 1.

(*q*) *Neat v. Allen*, 1 B. & P. 21.

(*r*) *Fossil's bail*, 7 D. & R. 783; and see *Wyllie v. Jones*, 2 D. & R. 253, *post*, 175.

(*s*) See *Bolland v. Pritchard*, 2 W. Bl. 799; *Doldern v. Feast*, 2 Str. 890; *Loft*, 153.

(*t*) *Bolland v. Pritchard*, 2 W. Bl. 799.

(*u*) *Hawkins v. Magnall*, Doug. 406.

(*v*) See *Daly v. Broochcroft*, 2 B. & B. 359, 5 Moore, 72, S. C. But see *Faulk-*

*ner v. Wise*, 2 B. & P. 150.

(*w*) — *v. Harvey*, M.S. E. 1824. See *vide Chick's bail*, 1 Chit. Rep. 714, *contra*.

(*x*) *Res v. Edwards*, 4 T. R. 440.

(*y*) *Anon.* 1 Dowl. P. C. 160.

(*z*) *Res v. Edwards*, 4 T. R. 440.

(*a*) See *Blundell v. Blundell*, 1 D. & R. 142, 5 B. & A. 533, S. C. In the Exchequer, if bail be once successfully opposed, they cannot justify until *fi.* has been deputed with the Master, to cover the costs. *Smith v. Cooper's assignees*, 1 Dowl. P. C. 287, 1 C. & J. 460, 1 Tyr. 378, S. C.; *Barrow v. Whitehead*, 2 Y. & J. 3.

money (generally 5*l.*) with the Master, in Court, to satisfy the amount of the costs when taxed, unless indeed the plaintiff's attorney consent to take the defendant's attorney's undertaking for the payment of them. It may be necessary to state, that the rule above-mentioned does not extend to country bail, the words "*appear to justify*," clearly indicating that it was intended to apply to town bail only (*b*).

We have seen (*ante*, pp. 157, 158), that if the plaintiff except to the bail after the notice of putting them in has been accompanied with an affidavit by them of their sufficiency, as prescribed by the rules of *T. T.* 1 *W.* 4, *r.* 3, and *H. T.* 2 *W.* 4, *r.* 19, (*ante*, 156), and the bail justify, the plaintiff will in general as of course have to pay the costs of such justification; unless, indeed, the Court otherwise order, and which they will do, if the affidavit be not in compliance with such rules (*c*), or unless there be such a defect in the affidavit, or notice of bail, or justification, as to justify the plaintiff in compelling a justification, or the Judge or Court to give him time to inquire after the bail (*d*). If, on the other hand, the bail, after making such affidavit, be rejected, the defendant will have to pay the costs of the opposition, unless otherwise ordered; (*R. T.* 1 *W.* 4, *r.* 3); or if the bail have not property according to that described in the affidavit, but have other property sufficient to enable him to justify, the Court will not allow such justification, unless the defendant pay the costs of the opposition (*e*), and in general the costs of opposing bail who have complied with the above rule of *T. T.* 1 *W.* 4, *r.* 3, but are rejected, are granted, as a matter of course, to the plaintiff, unless some very strong ground be shewn on the part of the defendant against it (*f*).

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the Court will compel him to pay the costs of putting them in (*g*).

*Further time for justifying.*] Before the time for justification has expired, if the defendant's attorney wish for an extension of time to add and justify bail, he may in general obtain it upon summons, if it appear to the Judge to be necessary, and not sought merely for the purpose of delay (*h*). The summons should be made returnable before the time for justifying the bail has expired (*i*).

Also, if the bail, from any unforeseen accident, cannot attend, or if, after notice of justification given, they refuse to attend, the Court, upon an affidavit of the fact, and that the person who has not attended had consented to become bail, and that if he had attended he would have been able to justify as good and sufficient bail in the action, will, in general, grant a further time, either to justify the same bail,

(*b*) *Henderson v. Dorling*, MS. E. 1824; *Fennell v. Gardner*, MS. E. 1829.

(*c*) *Semb. West v. Williams*, 1 Dowl. P. C. 162; *Jackson's bail*, *id.* 172.

(*d*) *Anon.* 1 Dowl. P. C. 126; *Thompson's bail*, 12th November, 1832, MS. 5 Leg. Obs. 225.

(*e*) *Jackson's bail*, 1 Dowl. P. C. 172; *Hemming v. Blake*, *id.* 179.

(*f*) *Beans's bail*, 1 Dowl. P. C. 384.

(*g*) *Gwynne v. Fuller*, 1 Dowl. P. C. 444.

(*h*) See *Maude v. Jowett*, 3 East, 145.

(*i*) *Redford v. Edie*, 6 Taunt. 240.

or to add and justify others (*k*). If the affidavit do not state the cause of the non-attendance of the bail, another affidavit must afterwards be made, stating it; and such second affidavit must be submitted to the Judge at chambers for his approval before the clerk of the rules can draw up the rule (*l*). There are two cases, however, in which the Court will not grant this indulgence; namely, where the defendant is in custody, (in which case further time would be useless, for he derives the same benefit from giving a new notice), and in bail upon a *habeas corpus*; there have been, indeed, two or three instances of the Court's granting a further time in this latter case, but they were under very peculiar circumstances.

So, if bail be not allowed to justify, from some defect in the affidavit of sufficiency, or in the notice of bail or of justification, or in country affidavits, the Court generally will allow a further time (*m*); but if the bail attempt to justify, and be rejected for any personal insufficiency before they are put in, the Court will seldom give a further time to add and justify others (*n*), but time will be granted where the insufficiency arises *after* they are put in (*o*). And here it may be necessary to mention, that if bail be rejected for the insufficiency of one or both of them, the bail piece becomes a nullity for this purpose, and you cannot afterwards add new bail upon it, unless otherwise allowed by the Court or a Judge; but if you would proceed to a justification of bail, you must give a new notice of putting in and justifying them (*p*).

A Judge will not, in general, interfere with another Judge's order of time to justify (*q*).

If one of the bail only attend, and the Court give a further time to justify, or to add and justify another, the one in attendance will, in general, be allowed to justify immediately, and not be put to the trouble of attending a second time; and the same in all other cases where a further time is required and granted, as to one of the bail only; but if one of the bail be rejected, for any personal insufficiency, the other will not, in general, be allowed to justify.

In all these cases, where a further time is applied for, the motion must be founded on an affidavit of the special fact alleged in excuse of the bail not attending; or, in case further time be given on the suggestion of counsel, a similar affidavit must be produced at the time so granted, otherwise the bail shall not be allowed to justify. (*R. M.* 36 *G.* 3). Such affidavit must state, that the persons not attending had consented to become bail, and were believed to be competent to justify (*r*), but that, for some alarm, they had not been able to attend, or that the reason of their non-attendance is unknown.

(*k*) See form of affidavit, *Chit. Forms*.

81.

(*l*) *Per Bayley, J.*, in — *v. Walduck*, *MS. H.* 1825. See *R. M.* 36 *G.* 3, *infra*.

(*m*) *Loft*, 194; 1 *Chit. Rep.* 495, *n*.; 2 *Chit.* 92.; and *MS. cases*.

(*n*) *Tidd*, 9th ed. 273; 1 *Sellon*, 158;

1 *Chit. Rep.* 2, *n*.

(*o*) *Id.*

(*p*) *Lewis v. Gadderor*, 5 *B. & Ald.* 704, 1 *D. & R.* 350, *S. C.*, *ante*, 161.

(*q*) *Tomlinson v. Harvey*, 2 *Chit. Rep.* 83.

(*r*) *West's bail*, 1 *Chit. Rep.* 292.

But in the latter case, it is not unusual for the Judge to suspend giving time, till an affidavit, satisfactorily explaining the non-attendance, has been laid before him.

When an order is thus made, for further time, *you must serve a new notice of justification (unless otherwise ordered by the Court or Judge) before 3 o'clock in the afternoon of the same day, and the affidavit of service must state at what hour it was served. (R. T. 59 G. 3). Draw up your rule in the evening, and serve it (s). Have the rule in Court, and be prepared with an affidavit of the service thereof, when the bail afterwards come up to justify.* A mistake in drawing up a rule for further time to justify bail on a wrong day, has been held immaterial (t).

*Time to plaintiff to inquire after bail.]* We have seen (*ante*, p. 152), that where the defendant has given a four days' notice, (before 11 in the morning, and exclusive of Sunday) of his intention to justify bail at the same time at which they are put in, and the plaintiff is desirous of inquiring after them, he should give one day's notice thereof to the defendant, his attorney, or agent, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, and then, unless the Court or a Judge otherwise order, the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time (u). In other cases, if the plaintiff has been taken by surprise, or there be some defect in the notice of bail, or notice of justification (x), which may have misled or deprived plaintiff of the means of making due inquiries, or the bail, on examination, give evasive answers (y), or the account given of them be suspicious (z), the Court or Judge will, in general, give the plaintiff further time to inquire into their character and circumstances.

*Rule of allowance.]* After the bail have justified, *go the same evening, or as soon afterwards as you conveniently can, to the rule office, and draw up a rule of allowance with the clerk of the rules; pay 4s. 6d. (a), and serve a copy of it upon the plaintiff's attorney (b),* for until this rule has been obtained and served, the bail are not deemed perfected, and the plaintiff may proceed against the sheriff or upon the bail bond, even although he were present and opposed the bail at the time they justified (c). *If the rule cannot, on*

(e) See form of the rule, Chit. Forms, 82; of the notice of justification, *Id.* 83; and of the affidavit of service of the rule, *Id.* 84.

(r) *Donaldson's bail*, 2 Chit. Rep. 83.

(u) See form of such notice, Chit. Forms, 73.

(z) *Vandermoolen's bail*, 1 Chit. Rep. 289.

(y) *Anon.* 1 Chit. Rep. 354, n.

(z) *Spurdens v. Mahony*, 1 Chit. Rep. 309, n.

(a) See the forms, Chit. Forms, 82, 84.

(b) See *Ward v. Nethercoate*, 7 Taunt. 145; 1 Chit. Rep. 675, n.

(c) *Messin v. Ld. Massareene*, 4 T. R. 493; *Biggins v. Holding*, 2 D. & R. 436; *Biggins v. Lee*, 1 B. & C. 285, S. C. 2 B. & P. 341; *Rex v. Sheriff of Middlesex*, in — *v. Farquhar*, 2 Chit. Rep. 99.

account of pressure of business, be obtained immediately after the bail have justified, and the time for justifying bail has expired, a written notice of the justification, and that the rule for allowance will be served as soon as the same can be obtained, should be immediately served on plaintiff's attorney. If bail has been improperly allowed, the Court will, in general, set aside the rule for allowance. (*See ante* 169, and *post*, 175). Bail are not, in general, in a condition to make any motion to the Court until they are allowed (*d*). If the defendant be in the custody of the warden or sheriff, a supersedeas seems requisite to get him out of custody, the mere production of the rule for allowance not being sufficient. (*Post*, 179, 180).

*Filing bail piece.*] We have before observed (*ante*, 165) that the bail piece is given to the Master in Court, at the time the bail justify; and he carries it with him to his office. *Call, therefore at the Master's office, and his clerk will give you the bail piece; (or if the bail have justified at chambers, the Judge's clerk will give it to you); pay him 1s.; take it then to the office of the signer of the writs, and file it with him,* for the doing of which the rule of allowance will be his authority. If the plaintiff accept of the bail, the defendant's attorney should cause the bail piece to be filed with the Master within *twenty days* after such acceptance; (*R. T. 13 Car. 2*); or if the plaintiff do not except to the bail for insufficiency within twenty days next after notice thereof given to him or his attorney, then, upon an affidavit in writing of such notice on the back of the bail piece, for which affidavit no fee shall be taken, the bail piece shall be filed by the defendant's attorney within *four days* next after the end of the twenty days. (*R. M. 16 Car. 2*). In practice the bail piece is seldom filed, until immediately before a render, or proceedings had against the bail (*e*). If the defendant neglect to file the bail piece, the plaintiff may file it, if he want to sue upon the recognizance: but the defendant, if he render in discharge of his bail, must file it, in order to get an *exoneretur* entered on it. When the bail piece is filed, their recognizance should be *entered* on a roll (*f*), called the recognizance

(*d*) See *Sharp v. Sheriff*, 7 T. R. 226; *Joyce v. Pratt*, 6 Bing. 377.

(*e*) When writs were returnable in term only, regularly, the bail piece ought to have been filed during the same term the bail were allowed. (*R. H. 1650, r. 3*). Formerly, also, when writs were returnable in term only, every bail taken on or before the continuance day, (that is, a certain day, usually eight or ten days after every term, appointed by the Master, on or before which entries, &c., made by the officers of the Court, might be made as of the preceding term, see *Pearson v. Rawlings*, 1 East, 406, and *R. E. 11 W. 3, r. 2*), was a bail, and to be filed of the preceding term; and every bail

taken after the continuance day was a bail, and to be filed of the subsequent term. But where new bail were added to other bail taken on or before the continuance day, the new bail were to be taken and filed as of that term in which the first bail was put in. *R. E. 5 G. 2, r. 1; Gilb. B. R. 341*. Although, however, bail, when added and justified in vacation, were filed as of the preceding term, yet, bail acknowledged and justified in a subsequent term were not so filed, even when substituted for other bail put in of the preceding term. *Brandon v. Henry*, 3 B. & Ald. 514.

(*f*) See *post*, Chap. 4, Sect. 5, and the forms of the entries, Chit. Forms.

roll, which should be docketed and carried into the treasury chamber. This is usually done by the plaintiff, and it need not be done until you purpose taking proceedings against the bail.

*Fraud, &c. in procuring justification, &c. Perjury. Personating bail.* If any fraud or malpractice have been used in procuring the justification of the bail, and which was not known to the plaintiff, or his attorney, at the time, the Court or a Judge, upon application, will, in general set aside the rule of allowance; in which case you may immediately proceed against the sheriff or upon the bail bond. When it was discovered, after bail were opposed and allowed, that one of them had, on a former occasion, been rejected, the Court set aside the rule of allowance, although it appeared that he had since become a person of considerable property (g). In another case, where it appeared that one of the bail received money from the defendant's attorney, for his trouble and loss of time in coming up to justify, the Court, upon application, were inclined to set aside the rule of allowance, but ultimately allowed the bail to stand, upon the terms of producing an affidavit of merits, bringing the sum for which the bail justified into Court and taking short notice of trial (h).

If the bail forswear themselves, they may be indicted for the perjury (i); and if the defendant, or his attorney, have been concerned in procuring them to do so, the Court, perhaps, would punish them in a summary way (k). But the Court will not, in such a case, set aside the rule of allowance; at least unless it appear that the defendant, or his attorney, were privy to the fraud (l). In a late case, however, the rule for the allowance of bail was discharged on an affidavit of perjury by one of the bail, such affidavit being uncontradicted; though the Court refused to detain the principal in custody, the knowledge of such perjury not being brought home to him (m).

If bail personate other persons, it is a felony, whether committed in Court, &c. (21 J. 1, c. 26, s. 2), or before a commissioner. (4 & 5 W. & M. c. 4, s. 4). And where they had merely assumed feigned names, the Court ordered that the bail and the attorney should stand in the pillory (n).

## 2. Bail put in in the Country.

*Before whom to be put in.*] The Chief Justice, or one or more of the puisne Judges of the Court of King's Bench, shall grant commissions to such persons as they shall think fit (not being attorneys) in the several counties of England and Wales, and in the town of Berwick-upon-Tweed, to take all such recognizances of bail as any per-

(g) *Pickard v. Dobson*, 3 D. & R. 5, ante, 169.

(h) *Wyllie v. Jones*, 2 D. & R. 253; *Foxall's bail*, 7 D. & R. 783.

(i) *Royson's case*, Cro. Car. 146.

(k) *A'Becket v. Rawley*, 5 Taunt. 776.

(l) *Id.*; *Shee v. Abbott*, 2 B. & B. 619, 5 Moore, 321, S.C.; *Stockham v. French*, 1 Bing. 365.

(m) *Barling v. Waters*, 6 Bing. 423.

(n) *Anon.* 1 Str. 384.

son shall be desirous to acknowledge before them, in any action depending in the said Court, in such manner and form as the justices of the said Court are used to take the same; (4 W. & M. c. 4, s. 1); so, any Judge of assize, in his circuit, may take such recognizance; (Id. s. 3); and the recognizance or bail piece so taken, shall be of the like effect, as if the same were taken *de bene esse* before one of the Judges of the Court. (Id. s. 1).

*By whom, when, and how put 'in.'*] We have already seen *by whom* bail may be put in; also when it *may* be put in in the case of town bail, and the same observations will apply to the case of country bail (*ante*, 151). The bail, it seems, *must* be put in within such time, that the bail piece may be transmitted to, and filed with, the Judge on or before the eighth day, inclusive, after the arrest of the defendant; (*vide infra*); for in all cases, bail must be put in within eight days after such arrest; (*see ante*, pp. 96, 151); and bail taken before a commissioner is not considered as put in until it has been transmitted and filed with the Judge. (*Post*, 177).

The bail in this Court are thus put in: *Make out a bail piece on a plain piece of parchment* (o). *Also, if the bail reside at a greater distance than ten miles from London or Westminster, write out an affidavit or affidavits of justification on plain paper, as prescribed by the late rules* (*ante*, 156); or it may be according to the old form, stating that the bail are housekeepers or freeholders, and worth double the sum sworn to over and above what will pay all their just debts (p). such affidavit purporting to be according to those rules, and not containing all its requisites, is good, if it be sufficient according to the old form (q): but not so if *vice versa*; and, therefore, where the affidavit, which was according to the old form, merely swore that the bail were possessed of so much money over and above their first debts, it was held bad; it ought to have stated that they were worth that sum (r). *Take the bail piece and affidavit or affidavits to a commissioner of the Court for taking recognizances, and let the bail accompany you. It is not necessary that both the bail should justify before the same commissioner(s). The commissioner will then take their recognizance; pay him 2s.; and at the same time let the bail swear the affidavit or affidavits of justification before him. Next, write out an affidavit of the due acknowledgement of the recognizance or bail piece on plain paper* (t), *and let it be sworn before a commissioner of this Court for taking affidavits*, (R. 8 W. 3, r. 3, s. 2), (not being the defendant's attorney, see R. E. 15 G. 2, r. 2), *by the attorney or person who accompanied the bail to the commissioner. This affidavit of caption need not be sworn before the same commissioner as the affidavit of justification* (u). *It may, if you wish, be made before a Judge*

(o) See the form, Chit. Forms, 84.

(p) See the form, Id. 73, 85, 86; *ante*, 156; and see *Horne v. Carr*, 4 Taunt. 704.

(q) *Anon.* 1 Dowl. P. C. 115.

(r) *Simpson's bail*, 22nd Nov. 1832,

*Exchequer; Hamlyn v. Woodcock*, 1 C. & J. 180; *ante*, 157.

(s) *Anon.* 3 Chit. Rep. 91.

(t) See the form, Chit. Forms; *ante*, 157.

(u) *Brewster v. Hunt*, 3 Chit. Rep. 91.

of the Court in town. (R. 8 W. 3, r. 3, s. 2). These affidavits must state in the jurat the names of all the deponents (v), and the place of swearing (x). Lastly, annex these affidavits to the bail piece, and send them without delay to your agent in town.

Bail may be put in before a Judge of assize, in the same manner, excepting that no affidavit of the due acknowledgment of the recognizance is in that case necessary. (4 W. & M. c. 4, s. 3).

*When and how transmitted.*] The recognizance or bail piece so taken shall be transmitted to one of the Judges of this Court, who, upon affidavit made of the due taking of such recognizance or bail piece, by some person present at the taking thereof, shall receive the same, upon payment of the usual fees; which recognizance or bail piece so taken and transmitted, shall be of the like effect as if the same were taken *de bene esse* before one of the said Judges. (4 W. & M. c. 4, s. 1).

The bail piece must be transmitted and filed within *eight days*, unless the defendant reside more than *forty* miles from London, and in that case within *fifteen* days after the taking thereof. (R. II. 2 W. 4, r. 14). If not so transmitted and filed, the bail bond, if any, may be assigned and proceedings taken thereon, or you may proceed against the sheriff.

*As soon as the agent in town receives the bail piece, he should take it and the affidavit of the due acknowledgment of the recognizance, to the Judge's chambers, and file them there; pay 5s. in term, and 1s. more in vacation.*

*Notice of bail.*] After filing the bail piece, &c. serve a notice thereof on the agent of the plaintiff's attorney (y). This should be done before the time for putting in bail has expired. It is usual also, and advisable, since the rules of T. T. 1 W. 4, and H. T. 2 W. 4, (ante, 156), although not absolutely necessary, to give him at the same time a copy of the affidavit or affidavits of justification, as it may have the effect of preventing an exception. The observations already made, (ante, 154) as to the form and service of the notice of bail in town cases, will apply to the case of country bail (z).

*Exception.*] If affidavits of the sufficiency of the bail, and especially if they be in the form pointed out by the rules of T. T. 1 W. 4, and H. T. 2 W. 4, (ante, 156), have been made out, it is not usual, nor advisable, to except to the bail, unless there be substantial grounds for doing so. If, however, they be excepted to, it must be within *twenty* days after notice of bail has been given; or within *one* day before the time for putting in and justifying the bail has expired, in cases where the defendant has given notice of justifying the bail at the time of putting

(v) *Wellings v. Marsh*, 11 Price, 509.

(x) *Webster's bail*, 1 Chlt. Rep. 10; *Carrington's bail*, Id. 495.

(y) See the form, Chlt. Forms, 86.

(z) *Anon.* 1 Dowl. P. C. 259.



them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rules of *T. T. 1 W. 4*, and *H. T. 2 W. 4*, (*ante*, 156). The exception is entered in the bail book at the Judge's chambers, in the ordinary way, as in the case of town bail. (*Ante*, 159, 160) (*b*).

If no exception be entered within the time limited, take the bail piece from the Judge's chambers and file it with the signer of the writs, as directed, *ante*, 159.

After entering the exception, notice thereof should be given to the defendant's agent, as directed, *ante*, 160 (*c*). This must also be done within twenty days after service of the notice of bail, (*ante*, 160), or one day at least before the time for putting in and justifying the bail has expired, in cases where the defendant has given notice of justifying the bail at the time of putting them in, and has accompanied the notice with affidavits by them of their sufficiency, according to the rule of *T. T. 1 W. 4*, and *H. T. 2 W. 4*, *ante*, 156.

*Notice of justification.*] Notice of justification must be given within the same time as when bail are put in in town, (*see ante*, 162), and in the same manner, excepting that where the bail are to justify by affidavit, that fact must be stated in the notice (*d*).

*Justification, &c.*] Many of the observations before made, (*ante*, 164 to 175), as to the justification, opposition, and allowance, &c. of bail in town cases, will apply to bail in country cases. There are three modes of justification: in open Court, or before a Judge at chambers, or by affidavit. (*R. 8 W. 3, r. 3, s. 5*). If the bail reside in London or Westminster, or within ten miles thereof, they must, in person, justify in open Court, or before a Judge at chambers, as in ordinary cases where the bail is put in in town (*e*); but if they reside above ten miles from London or Westminster, they shall not be obliged to appear personally in Court, but may justify by affidavit. (*4 W. & M. c. 4, s. 2*).

The mode of justifying by affidavit in Court is thus: *The evening before, desire the Judge's clerk to bring the bail piece or affidavit into court. Make an affidavit of service of the notice of justification, as in ordinary cases (f); and inclose it and the affidavit or affidavits of justification in a motion paper, and give them to counsel to move. The motion must be made before ten o'clock.* If the bail are opposed, it must be by cross affidavits (*g*). If the bail be opposed, the Judge will give time, if necessary, to answer the matters of the affidavits; so, if any of the affidavits be defective, the Judge will give time to have the defect remedied (*h*). But, in a late case, time to amend a mistake in the jurat occasioned by the error of the commissioner in the

(b) See the form, Chit. Forms, 74.

(c) *Id*

(d) *Id*

(e) *Anon. 1 Dowl. P. C. 293, 79.*

(f) See the form, Chit. Forms, 79.

(g) See form of such an affidavit, Chit. Forms, 80; and see the observations, *ante*, 166.

(h) See, as to the rule for further time, *ante*, 171, Chit. Forms, 81, 83, 84.

country was refused, where the defendant did not produce an affidavit of merits (i). The defendant's attorney will have to pay the costs of the amendment. *After justification, draw up the rule of allowance and serve it, and file the bail piece with the signer of the writs, as in ordinary cases, as directed ante, p. 173 (j).*

### 3. Bail put in and justified, when the Defendant is in Custody.

Although the defendant be in custody of the sheriff or marshal, after the expiration of the eight days after the arrest, yet special bail may be put in and perfected at any time before final judgment (k).

In term time, this is done in the usual way, except that you mention in the bail piece that the defendant is in custody (l), and of whom, and make the like mention in the notice of justification, &c.; and also, except that the notice of bail and of justification may in all cases be incorporated in one; and also, except that the bail may be put in and justified at the same time, upon a two days' notice of putting in and justifying, and this, notwithstanding the late rule of T. T. 1 W. 4, (ante, 162), requiring a four days' notice for that purpose, in other cases where the defendant intends justifying bail at the same time at which they are put in (m). No exception is necessary, or indeed usual, and the rule of T. T. 1 W. 4, r. 4, which entitles the defendants to have the recognizance entered into under reg. 3, out of Court, without further justification, if a one day's notice of exception be not entered by the plaintiff, does not apply to this case of a prisoner (n). The bail justify as in other cases. After you have served the copy of the rule of allowance, take the rule to the marshal's office in the King's Bench prison (if the defendant be in the custody of the marshal) and it will be a sufficient warrant to him to discharge the defendant; and the same if the defendant be in the custody of the sheriffs of London or Middlesex. But if the defendant be in the custody of the sheriff of any other county, as the rule in that case contains an order, not for his discharge, but for a supersedeas merely, write out a supersedeas on plain parchment (o); and take it, together with the rule of allowance, and also the bail piece, to the signer of the writs, who will sign it; pay 1s. 8d.; get it sealed, pay 7d. Lodge the writ with the gaoler, who will thereupon immediately discharge the defendant (p).

In vacation the mode is different. By 43 G. 3, c. 46, s. 6 (q), a defendant in custody may put in and justify bail, in vacation, before a Judge of the Court from which the process issued, whereupon he

(i) *Burford v. Holloway*, 2 D. & R. 362; but see 1 Chit. Rep. 10, 495; *Shillitoe's bail*, 9 D. & R. 6.

(j) See the form of the rule of allowance, Chit. Forms, 82, 88.

(k) See ante, 152, Barnes, 92.

(l) *Chrichton's bail*, Exch. 17th Nov. 1832, MS. and 5 Leg. Obs. 144.

(m) *Davies v. Gray*, 10 Law J. 80. See the form of the bail piece, Chit.

Forms, 88; of notice of bail and justification, Id. 89; and of the affidavit of service thereof, Id. 79.

(n) *Webb's bail*, 1 Dowl. P. C. 446, ante, 158.

(o) See the form, Chit. Forms, 91.

(p) See *Knowlys v. Reading*, 1 B. & P. 311.

(q) And see 1 W. 4, c. 70, s. 12, ante, 165.

was arrested, upon due notice thereof being given to the plaintiff's attorney; and such Judge shall thereupon, if he think fit, order a rule to issue for the allowance of such bail, and may further order the defendant to be discharged out of custody by writ of supersedeas or otherwise, according to the practice of such Court, in like manner as the same is and may be done by an order of the Court in term time. This applies only to arrests on *mesne* process out of the superior Courts, but it seems a *habeas corpus* for the removal of a cause from an inferior court is within the act (r). Give notice that you will put in and justify bail, as directed ante, 179 (s). At the time specified in the notice, attend at the Judge's chambers, and wait there an hour; if at that time the opposite attorney do not attend to oppose the justification, the bail will be allowed to justify as of course, upon producing the affidavit of service of notice of justification; but if the opposite attorney attend, the bail may be opposed and examined in the manner stated ante, p. 166. If the bail be allowed to justify, the Judge will make an order directing the clerk of the rules to draw up a rule of allowance (t). Draw up the rule with the clerk of the rules (u); pay him 6s.; and serve a copy of it on the opposite attorney. Then take the rule to the King's Bench prison (if the defendant be in custody of the marshal or of the sheriffs of London or Middlesex), or sue out a *supersedeas* (if he be in custody of the sheriff of any other county, &c.) as is directed. (Ante, 179).

#### 4. Paying Money into Court in lieu of Special Bail.

In cases where the defendant has, in pursuance of the 43 G. 3, c. 46, s. 2, (ante, 126), in lieu of bail to the sheriff, deposited in his hands the sum indorsed on the writ, and 10*l.* for costs, to answer the costs up to the eighth day inclusive after the arrest, and the sheriff has paid these into Court, as he is bound to do, the defendant, instead of putting in and perfecting special bail, may, by virtue of the 7 & 8 G. 4, c. 71, s. 1, allow such sums, together with the additional sum of 10*l.*, to be paid into Court by the defendant as a further security for costs, to remain in Court to abide the event of the suit. In other cases, where the defendant has *not* made such deposit with the sheriff, the defendant, instead of putting in and perfecting special bail, may deposit and pay into Court the sum indorsed on the writ, and 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit. In either case, the defendant must thereupon enter a common appearance within such time as he would have been required to have put in and perfected special bail, or in default thereof the plaintiff may enter such appearance, and the cause may proceed as if the defendant had put in and perfected special bail; and if judgment be given for the plaintiff, he will be entitled, by order of the Court, upon motion, to receive the money so remaining in, or so deposited or paid into the Court, or so much thereof as will be sufficient to sa-

(r) Tidd, 9th ed. 279; *sed vide* Steer v. Smith, 1 Chit. Rep. 44.

(s) See the form of the notice, Chit.

Forms, 89.

(t) See the form, Chit. Forms, 90.

(u) *Id.*

tisfy the sum recovered by the judgment and the costs of the application; and if judgment be given for the defendant, or the plaintiff discontinue, or be otherwise barred, or if the sum deposited and paid into Court be more than sufficient to satisfy the plaintiff, the money so deposited or paid into Court, or so much thereof as shall remain, will, by order of the Court, upon motion, be repaid to the defendant. In a case prior to this statute of 7 & 8 G. 4, the Court of Common Pleas allowed a defendant, instead of putting in bail, to pay into Court the sum sworn to and 40*l.* to answer costs, upon his paying such costs as had already been incurred in opposing bail, which he had previously attempted to justify, and the costs of the proceedings against the sheriff (*x*). Money paid into Court under the above statute is not a payment to a creditor within the protection of the bankrupt act; (6 G. 4, c. 16, s. 82); nor, if paid in after an act of bankruptcy, and less than two months before a commission issued, is it within the protection of the 31st section of that act (*y*).

In cases where the defendant has paid money into the hands of the sheriff in lieu of bail to him, and is desirous of thus allowing the same to remain in lieu of special bail, *he should give notice thereof to the plaintiff's attorney (z), and pay into Court an additional sum of 10*l.*, as a security for costs.* This may, it seems, be done at any time before or on the day allowed for perfecting the special bail (*a*). Also, in the other cases of the payment of money into Court in lieu of bail, it may, it seems, be made at any time before or on such day. To pay into Court this additional 10*l.*, where you have deposited money with the sheriff, in lieu of bail to him, or to pay into Court the monies above mentioned to be paid in in lieu of special bail, leave of the Court is necessary. *Such leave may be obtained by a side bar rule.* (See R. H. 2 W. 4, r. 55). *Make out a præcipe or memorandum of the rule you want. Pay the money into Hoare's bank in Fleet Street, and get a receipt; take this receipt to the signer of the writs, who will thereupon give you his receipt in exchange. Pay him 2*s.* 4*d.* He is not entitled to any poundage on the money (*b*). Then take this receipt and præcipe, or memorandum above mentioned, to the clerk of the rules, who will draw up the rule (*c*); pay him 3*s.* 6*d.*, and serve a copy of it on the plaintiff's attorney. After this the defendant must enter a common appearance, as in other cases, (as to which see *post*, 454), within such time as he would have been required to have put in and perfected special bail, (as to which, see *ante*, 151, 162, 164); or in default thereof plaintiff may enter it for him; (as to the mode of doing which, see *post*, 454). Upon this, in the case of a bail bond given, the defendant would be entitled to have it delivered up to be cancelled (*d*).*

The defendant who has made this deposit and payment into Court

(*x*) *Fowell v. Leo*, 1 Taunt. 425, and see 8 T. R. 28.

(*y*) *Ferrall v. Alexander*, 1 Dowl. P. C. 132.

(*z*) See a form, Chit. Forms, 91.

(*a*) *Rowe v. Softly*, 4 M. & P. 464,

6 Bing. 634, S. C.

(*b*) *Hunn v. Brine*, 6 Moore, 124; *Haines v. Navine*, 2 Dowl. P. C. 43.

(*c*) See the forms, Chit. Forms, 92.

(*d*) *Smith v. Jordan*, 2 M. & P. 428.

may, at any time before issue joined in law or fact (*d*), or, in the case of a judgment by default or confession before final or interlocutory judgment signed, receive the same out of Court (*e*), by order of the Court, upon putting in and perfecting special bail in the cause, and payment of such costs to plaintiff as the Court may direct. (7 & 8 G. 4, c. 71, s. 3).

The defendant also, who has put in and perfected special bail, may, upon motion to the Court, if the Court think fit, deposit and pay into Court the sum which would have been deposited and paid in case the defendant had originally elected so to do, together with such further sum, to answer the costs, as the Court may direct, to abide the event of the suit, and to be disposed of in manner aforesaid; and thereupon the Court will direct a common appearance to be entered for defendant, and an exoneretur to be entered upon the bail piece. (s. 4).

On the application of the defendant, the Court will make an order that the plaintiff shall be at liberty to take out of Court a part of the sum paid in; and that unless he consent to accept thereof, with costs, in full discharge of the action, the same shall be struck out of the declaration; and that the plaintiff shall not give any evidence at the trial as to that sum (*f*).

In case of a judgment for the plaintiff, the money still remaining in Court, then in order to get it out of Court, give a motion paper with an affidavit of the money having been paid in, and of the judgment being signed, to counsel to move for a rule to shew cause (*g*) why the plaintiff should not receive all the money out of Court, or, in case the judgment be for less, then so much thereof as will be sufficient to satisfy the sum recovered, and the costs of the application. If a rule be granted, draw it up with the clerk of the rules, and serve a copy of it, as in other cases. (See post, Vol. 2, Book 4, Chap. 33). Take a copy of the rule to the signer of the writs, who will thereupon pay you the money. The plaintiff is bound to resort to this money in the first instance, and cannot issue execution except for the deficiency, if any, after allowing for such money (*h*).

In case of a judgment for the defendant, or if the plaintiff discontinue or be otherwise barred from recovering, or in case the sum in Court be more than enough to pay the plaintiff; then, in order for the defendant to get it or the surplus out of Court, give a motion paper with an affidavit of the money having been paid in, and of the judgment, according to the facts, to counsel to move for a rule to shew cause (*i*) why the money should not be repaid to defendant. If the rule be granted, draw it up with the clerk of the rules, and serve a copy of it as in other cases. (See post, Vol. 2, Book 4, Chap. 33). Take a copy of the rule to the signer of the writs, who will thereupon pay you the money. He is not entitled to any poundage (*j*).

(*d*) *Hanwell v. Mure*, 2 Dowl. P. C. 155; *Ferrall v. Alexander*, 1 Id. 132.

(*e*) As to the mode of taking out money paid into Court, see post, Vol. 2, Book 4, Part 1, Chap. 9.

(*f*) *Hubbard v. Wilkinson*, 8 B. & C. 496; and see the form of rule, Chit. Forms, 93.

(*g*) See *Symes v. Rose*, 5 Bing. 269, 2

& P. 426, S. C.

(*h*) *Hewes v. Pyke*, 1 Dowl. P. C. 322, 2 C. & J. 359, S. C.

(*i*) *Symes v. Rose*, 5 Bing. 269, 2 M. & P. 426, S. C.

(*j*) *Hurn v. Brine*, 6 Moore, 124; *Haines v. Navine*, 2 Dowl. P. C. 43; and see *Stewart v. Bracegirdle*, 2 B. & Ald. 770.

## CHAPTER II.

PROCEEDINGS FROM THE DECLARATION TO THE ENTERING OF THE  
CAUSE FOR TRIAL, INCLUSIVE.

## SECT. 1.

*The Declaration.*

1. *When to declare*, 183 to 188.
2. *How to declare*, 188 to 193.

1. *When to declare.*

*Before the time for appearing has expired and before appearance(a).]*  
It should be premised that, previous to the statute of 2 W. 4, c. 39, the plaintiff could not declare before the return of the writ in any instance, or under any circumstances. Also, that in all cases where the process was not against the *person*,—as, where the proceedings were by original, summons and distringas, or the like,—the plaintiff could not have delivered or filed his declaration until the defendant had actually appeared. But in all other cases, where the process was against the person, (such as the *capias*, bill of Middlesex, or *latitat*, bailable or otherwise) (*b*), the plaintiff might have delivered or filed his declaration *de bene esse*, on or after the return day of the writ (*c*); or, by original, on or after the *quarto die post* (*d*); provided six days in-

(a) The term "appearance" means entering a common appearance in *non-bailable* process, or putting in and perfecting bail above, or paying money into Court instead of such bail, in *bailable* process. In *non-bailable* process, the defendant has eight days after the service of the writ, inclusive of the day of the service, to enter an appearance; and in default of his so doing, the plaintiff may (if the writ was served personally on the defendant) enter an appearance for him, and proceed thereon to judgment and execution. In *bailable* process the defendant has eight days after the arrest, inclusive of the day of

arrest, to put in special bail; and as to when he must perfect it, see *ante*, 162, 164.

(b) Formerly, also, to have enabled the plaintiff to declare *de bene esse*, the process must have been returnable before the last general return of the term. *Key v. Browne*, 3 D. & R. 28, 1 B. & Cres. 653, S. C.; *Wilson v. George*, 5 B. & Cres. 455, 8 D. & R. 135, S. C.

(c) See R. T. 22 G. 3, R. M. 10 G. 2; *Abbey v. Martin*, 1 H. Bl. 533; and see 1 Sellon, 226; *Robertson v. Douglas*, 1 T. R. 191.

(d) 1 Sellon, 227; and see *Golding v. Grace*, 2 W. Bl. 749.

clusive had elapsed after the service of the process or the arrest of the defendant; (*R. T. 1 W. 4, r. 10*); and provided the declaration had been delivered or filed before defendant had perfected bail in bailable cases (*e*); or before the time for the defendant's appearance had expired in non-bailable cases (*f*); and provided also it was so filed or delivered before the defendant had actually appeared, by putting in and justifying bail in bailable cases (*g*), or by entering a common appearance in non-bailable cases (*h*).

Now, however, it will be perceived that in *non-bailable* cases (unless in an action against several defendants where you do not intend arresting all of them) the writ of summons, or writ of summons and distringas thereon, is not a process against the person, and such being the case (*i*), the plaintiff cannot declare therein until an appearance has been actually entered, and then it must be *absolutely*. In *bailable* actions, by rule of *M. T. 3 W. 4, r. 11*, when the defendant is not in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ of capias, inclusive of the day of such expiration, may declare *de bene esse*, in case special bail has not been perfected. And if there be several defendants, and one or more of them has been served only and not arrested, and the defendant or defendants so served have not entered a common appearance, the plaintiff may enter a common appearance for him or them, and declare against him or them in chief, and *de bene esse* against the defendant or defendants who have been arrested, and who have not appeared by perfecting special bail. No declaration, however, can, in any case, either *de bene esse* or *absolutely*, be filed or delivered between the 10th August and 24th October. (*2 W. 4, c. 39, s. 11*). The time for the plaintiff's declaring where there are several defendants, will be subsequently noticed.

When you declare *de bene esse*, as you may do in *bailable* cases, indorse on your declaration a *notice to plead* in four days, if the action be laid in London or Middlesex, and the defendant live within twenty miles of London,—or in eight days, if the action be laid in any other county than London or Middlesex, or the defendant live above twenty miles from London (*k*). Care should be taken to state that it is delivered or filed "*conditionally*," otherwise it will be irregular (*l*). This indorsement, however, is not essential, where the declaration is filed; for the notice of filing it is also a notice to plead. *Vide post*, 191.

The delivery or filing of the declaration *de bene esse* becomes ab-

(*e*) *Wendover v. Cooper*, 10 B. & Cres. 614.

(*f*) *Baker v. Cooper*, 6 T. R. 548, 2 Aust. 491, S. C.; *Turner v. Portall*, 2 New Rep. 231; *Kenman v. Bean*, Id. 433; *Smith v. Painter*, 2 T. R. 719.

(*g*) *Wendover v. Cooper*, 10 B. & Cres. 614.

(*h*) See *Turner v. Portall*, 2 New Rep. 232.

(*i*) Other reasons might, perhaps, be assigned for this rule; but this is deemed sufficient.

(*k*) See *R. T. 22 G. 3*; *R. T. 1 W. 4*. See form of the notice, *Chlt. Forma*, 109.

(*l*) *Evans v. Tillam*, Barnes, 257. See *Cort v. Jacques*, 8 T. R. 77; *Watkins v. Woolley*, 8 Taunt. 644, 2 Moore, 719, S. C.

solute upon special bail being put in and perfected; but if special bail be not put in and perfected, the plaintiff must then relinquish or suspend his proceedings on the declaration, and proceed either against the sheriff, or on the bail bond, as before directed.

It is entirely optional with the plaintiff to declare *de bene esse* or not; for he is not compellable to declare at all, until the defendant have appeared (*m*). But it is, in general, advisable to declare *de bene esse*, as it expedites the cause, and by omitting to do so, he might lose the benefit of the bail bond or attachment standing as a security, which he may otherwise have when the trial has been lost. (*Ante*, 146, 147).

The defendant, by taking the declaration out of the office, will waive the irregularity of its having been filed conditionally instead of absolutely (*n*). The defendant has always allowed him the opportunity of seeing the exterior of the declaration (*o*).

*After the time for appearance has expired and before appearance.]* We have just seen, (*ante*, 154), that in *non-bailable* actions the plaintiff cannot declare until an appearance has been actually entered; so that in such actions if the defendant has not appeared, and the time limited for the appearance has expired, the plaintiff must, in order to declare, enter an appearance for the defendant in pursuance of the statute, and then declare against him *absolutely*.

In *bailable* actions, when the defendant is not in custody, the plaintiff may declare *de bene esse* at any time after the expiration of eight days inclusive after the arrest, and before the defendant has actually perfected bail (*p*); and it is in general advisable for him to do so. (*Supra*). He could not declare absolutely before the bail be perfected, without waiving his right to a justification of the bail. (*Ante*, 159). If the defendant, after plaintiff's declaring *de bene esse*, do not perfect bail, the plaintiff should proceed against the sheriff or upon the bail bond, as already directed, (*ante*, 131, 139). No declaration, either absolutely or *de bene esse*, can be filed or delivered between the 10th August and 24th October.

*After appearance.]* After bail is put in and perfected in bailable cases, or an appearance entered in non-bailable cases, the plaintiff may declare *absolutely*. He should, however, take care in bailable cases not to declare absolutely before bail is put in and perfected: if he do so before bail is put in, it will be a waiver of bail; (*ante*, 150); if before justification, it will be a waiver of justification. (*Ante*, 159).

As regards the time in which the plaintiff *must* declare, it is to be observed that formerly in actions by *bill*, when that process was in existence, if an appearance was entered for the defendant by attorney of the term in which the process was returnable, the plaintiff

(*m*) *Merrymann v. Carpenter*, 2 Str. 1262.

(*n*) *Gilbert v. Kirkland*, 1 Dowl. P. C. 153.

(*o*) *Ib.*; *Robins v. Richards*, Id. 379.

(*p*) R. M. 3 W. 4, r. 11, *ante*, 184; and see *Wendover v. Cooper*, 10 B. & Cres. 614.



must have declared in chief before the end of the term next after that of which the appearance was entered; otherwise the defendant might have judgment of *nonpros* against him, and was entitled to costs. (13 C. 2, st. 2, c. 2, s. 3. See Vol. 2, title "Nonpros"). And where an appearance was entered after the essoign day of Hilary term and before the day of full term, as of the previous term in which the writ was returnable, (which might be done), the Court held that a judgment of *nonpros* signed for the plaintiff's not having declared in the Hilary term, was regular (q). The plaintiff, however, was never bound to declare, pending a treaty between him and the defendant (r); nor could the defendant sign judgment of *nonpros*, if he had not appeared in the term in which the writ was returnable. Also, if the plaintiff did not declare within the time above mentioned, and the defendant did not take advantage of his neglect by signing judgment of *nonpros*, he might afterwards declare at any time within a year after the return of the process (s); but if he did not declare within that period he was deemed out of Court. (R. H. 2 W. 4, r. 35). In actions by *original*, it seems that the practice in this Court was the same as in the Court of Common Pleas, namely, that the plaintiff had, until the end of the term next after that in which the process was returnable, to declare. If he did not declare within that time, the defendant might, before the essoign day of the third term, (having appeared of the term the writ was returnable, and having made a written demand of declaration, and waited four days after it), sign judgment of *nonpros* (t). If the plaintiff did not declare within a year after the return of the process, he was deemed out of Court. (R. H. 2 W. 4, r. 35).

Some doubts must now exist as to the time within which the plaintiff must declare in actions commenced by the new process of writ of *summons*, or writ of *capias*; it is submitted, however, that he must so declare before the end of the term next after the eighth day, inclusive, from the execution of the process, otherwise a *nonpros* may, after a four-day demand of declaration, be signed against him. But if no such *nonpros* be obtained, then he may declare at any time within a year next after the eighth day, inclusive, from the execution of the process, unless otherwise ordered by the Court or a Judge; but if he do not declare within that period, he will be deemed out of Court (u). It is clear that in proceedings against a prisoner in cus-

(q) *Prigmore v. Bradley*, 6 East, 314, 2 Smith, 405, S. C.

(r) *Walter v. Stewart*, 2 W. Bl. 918, S. C., 3 Wils. 455.

(s) *Worley v. Lee*, 2 T. R. 112; *Penny v. Harvey*, 3 Id. 123; *Sherson v. Hughes*, 5 Id. 35.

(t) 1 Sel. 359, 360. See R. M. 10 G. 2, r. 2; R. T. 1 W. 4, r. 8.

(u) In Mr. Chapman's second addenda to the new rules, page 115, the practice is laid down thus: "A plaintiff, to pre-

vent being nonprossed, must declare within two terms after the return of the writ, (that is, now, after the execution of the writ). If the writ be executed in the vacation, it would seem, from a parity of reasoning in similar cases of practice, that he must declare before the end of the following term, or a *nonpros* may be signed, but he may have a rule to declare as heretofore." It is probable some rule of Court will be passed to settle the practice.

today at the plaintiff's suit, he must be declared against before the end of the term next after the arrest or detainer, or render and notice thereof, otherwise he will be entitled to be discharged on entering a common appearance (x).

If the plaintiff be not ready to declare within the time limited, *obtain from the clerk of the rules a side bar rule for time to declare* (y), (*R. H. 2 W. 4, r. 38*), *until the first day of the following term; pay 1s. 6d. Serve a copy upon the defendant's attorney* (z). You may afterwards obtain rules for further time, from the beginning to the end of the term, and from the end of one term to the beginning of the next, as often as you think necessary, in the same manner (y). The defendant, on the other hand, if he wish to compel the plaintiff to declare, should *obtain from the clerk of the rules, upon counsel's signature, a rule to declare before the end of the term; and, after serving it upon the plaintiff's attorney or agent, if he do not comply with such rule, the defendant may then, in the same way, obtain a peremptory rule to declare* (y) *within a certain time, and if the plaintiff do not declare within the time so limited, the defendant may, after a four-day written demand of declaration, sign judgment of nonpros*. But now, by the late rule of *II. T. 2 W. 4, r. 38*, it is not in any case necessary for a defendant to give a rule to declare except upon removals from inferior courts, in which latter case the rule to declare may be given within four days after the end of the term in which the writ is returned. (*R. H. 2 W. 4, r. 37*). *A rule to declare peremptorily may be in any case absolute in the first instance.* (*Id. r. 39*). This term "peremptorily" only prevents a plaintiff from taking out more rules for time to declare, and therefore if the defendant signs judgment of nonpros after the rule to declare has run out, but the plaintiff has declared in the interim, the judgment is irregular (a).

So, where one of several defendants, against whom you intend to proceed, or must proceed jointly, is served with process or arrested, and the other cannot be served or arrested, the plaintiff should apply to the Court, or to a Judge in vacation, for time to declare against the defendant who was served or arrested, until the appearance or outlawry of the other (b); for a declaration delivered to the one served or arrested, and afterwards to the other, when he appears, would be irregular (c). The affidavit, upon which such an application is grounded, should state that the plaintiff cannot find the other defendant, and that he is using all due diligence in proceeding to serve or outlaw him; otherwise, the Court may possibly order the defendant, if he was arrested, to be superseded (d). It may be as well here to

(x) *R. T. 3 W. 4, post; and post*, Vol. 2, Book 3, Part 4, Chap. 4, p. 638. See the first warning to the writ of *capias*, ante, 96.

(y) See the form of these rules, Chit. Forms, 94.

(z) *Towers v. Powell*, 1 H. Bla. 290 a.

(a) *Gray v. Pennell*, 1 Dowl. P. C. 120.

(b) *Morton v. Grey*, 9 B. & C. 544; *Williams v. Manwaring*, Barnes, 401.

(c) *Morton v. Grey*, 9 B. & C. 544; *Knight v. Parker*, 2 W. Bl. 759; and see *Sykes v. Bauwens*, 2 New Rep. 404; *Turner v. Portall*, Id. 231; *Kenman v. Bean*, Id. 433; *Stork v. Herbert*, 1 Wils. 242.

(d) *Tracey v. Garmston*, Barnes, 396.

notice, that by the rule *M. T. 3 W. 4, r. 1*, the writ must contain the names of all the defendants in the action, and not the names of any other defendants in any other action; therefore, if a writ be sued out against two defendants, the plaintiff cannot file or deliver two declarations against them severally. But, notwithstanding this rule, the plaintiff may, in a non-bailable action, on a writ against two defendants, declare against one only, provided, indeed, the cause of action be separate, and provided, also, the plaintiff drop his proceedings against the other entirely (*e*). The notice, however, of such a declaration, must not be intitled as against both (*f*).

Upon the back of the declaration thus delivered absolutely, indorse the notice to plead (*g*). As to the time to be mentioned in this notice, see the next Section, *post*, 194.

Formerly, the plaintiff and other persons might, in actions by bill or original, after the appearance of the defendant, have declared *by the bye*; but the present process being returnable in vacation as well as in term, it is submitted, that the former practice as to declaring *by the bye* can no longer prevail (*h*), and at all events as regards third persons so declaring.

*Nonpros.*] If the plaintiff do not declare in due time, or within such further time as he may obtain of the Court or a Judge, the defendant may, at the expiration of four days next after a written demand of declaration, served upon the plaintiff, or his attorney, or agent, as the case may be, (*R. T. 1 W. 4, r. 8*), sign judgment of *nonpros*. This is a final judgment (*i*).

## 2. How to declare.

*Engross your declaration upon plain paper. It is no objection that it is partly written, and partly printed, and it is the common practice so to engross it (j).* Indorse on it the notice to plead, as directed, *post*, 193, when you declare absolutely (*k*). In some cases, also, indorse on it a demand of plea, and as to which see *post*, 197, 198. If the declaration is to be filed, charge, on the back of it, 4d. per folio of 72 words, and 4d. for the warrant of attorney. As the practice may require, (and as to which see *post*, 191), file it

(*e*) *Edans v. Whitehead*, 2 M. & R. 367; *Bowles v. Bolton*, 2 C. & J. 474; *post*, 190.

(*f*) *Id.*

(*g*) See the form, *Chit. Forms*, 109.

(*h*) In actions by *original*, the plaintiff could not declare *by the bye* until after the defendant had appeared, and then, only within the term in which the process was returnable. In actions by *bill*, the plaintiff could not have declared *by the bye* until after the defendant had appeared; but he might have done so at any time afterwards, pro-

vided he did so before the end of the term next after that in which the process was returnable. *Smith v. Muller*, 3 T. R. 627; R. M. 10 G. 2; and see further, 1 Arch. Pract. 2nd ed. 123.

(*i*) See the form of it, *Chit. Forms*; and see *post*, Vol. 2, Book 4, Part 1, Chap. 18, tit. "Judgment of *Nonpros*."

(*j*) *Brand v. Rich*, 2 Moore, 654, 8 Taunt. 591, S. C. See *vide Champneys v. Hamlin*, 12 East, 294; *Hartop v. Jukes*, 1 M. & Sel. 709; *Doe d. Irwin v. Roe*, 1 D. & R. 562.

(*k*) See the forms, *Chit. Forms*, 109.

with the clerk of the declarations in the King's Bench office, and give the defendant's attorney notice of your having done so; or deliver it to the defendant's attorney.

*In what form.*] As this and other subjects of pleading could not be treated of in other than a cursory manner in a work of this description, and as a cursory notice of them would be of little practical utility, it is thought better to omit them altogether, and to refer the reader to works written expressly upon the subject.

By rule of *M. T. 3 W. 4, reg. 15*, the declaration in an action commenced by the process prescribed by the *2 W. 4, c. 39*, must be *intituled* in the proper Court, and of the day of the month and year on which it is filed or delivered, and the same rule also points out the forms of the commencement of declarations (*l*), and declares that the entry of *pledges* to prosecute at the conclusion of the declaration shall in future be discontinued. Perhaps, if the declaration were intituled of a day different to that on which it was actually filed or delivered, it might be deemed irregular; and a judgment signed for want of a plea thereto, would be set aside (*m*). Besides this, the defendant may, as of right, compel the plaintiff, by rule, to intitle it of the day at which it was actually delivered to him (*n*).

To avoid unnecessary expense to parties, by reason of the *length* of declarations in actions on bills of exchange, promissory notes, and causes of action recoverable under the common counts, the Courts have, by rule of *T. T. 1 W. 4*, prescribed forms of declarations (*o*) in such actions, and ordered that the declaration shall not exceed in length such of the forms as may be applicable to the case; and if it does, then that no costs of the excess shall be allowed the plaintiff if he succeeds, and the costs of the excess incurred by the defendant shall be taxed and allowed to him, and be deducted from the costs allowed to the plaintiff—and it is thereby further ordered, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of such excess of length; and, in case any costs shall be payable by plaintiff to defendant, on account of such excess, the amount thereof shall be deducted from the attorney's bill. And, as another protection to the defendant against the unnecessary length of the declaration, it is a rule that no costs shall be allowed on taxation to the plaintiff, upon any counts or issues upon which he does not succeed, and that the costs of all issues found for the defendant, shall be deducted from the plaintiff's costs. (*R. H. 2 W. 4, r. 74*) (*p*). The Court or a Judge also may order the Master to strike out superfluous counts before plea pleaded. (*See post, Vol. 2,*

(*l*) See them, *Chit. Forms*, 95, 96.

(*m*) *Sendl. Topping v. Fuge*, 1 Marsh. 341, 5 Taunt. 330, 771, 1 Marsh. 344, S. C.; *Rowlee v. Lawrence*, 11 Moore, 338.

(*n*) *Wilkes v. Hallfax, Earl of, 2 Wils. 256; Thompson v. Marshall, 1 Id.*

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(*o*) See the forms properly filled up, *Chit. Forms*, 96 to 107.

(*p*) See also the rule as to not reciting the writ in actions by original. *R. H. 2 W. 4, r. 17.*

*Book 4, Part 1, Chap. 7*). And it is now becoming a practice for the Judge at the trial, in the case of a declaration containing unnecessary counts, to compel the plaintiff to elect to take a verdict on one or more of them only.

It may be as well here to mention that the declaration should correspond in the names and number of the parties, (*ante*, p. 102), in the character in which they sue or were sued, (*ante*, p. 101), and in the cause of action, (*ante*, p. 103, 104), as stated in the writ, and the affidavit to hold to bail, (*ante*, p. 90). If the declaration be defective in this respect, the defendant will, in bailable cases in general, be discharged on entering a common appearance; and, in some cases, the declaration would be set aside for irregularity. Where, after issue joined in assumpsit for goods sold, the plaintiff added a count for not delivering a bill of exchange, and recovered upon that count only; the Court held the bail to be discharged (*q*). If the process be against two, and one only be arrested or served, the plaintiff must in general first outlaw or compel the appearance of the other, before he can declare against the party arrested or served (*r*). If he declare against one only, where two are named in the writ, the other may sign judgment of *nonpros* (*s*); and the same, if he serve notice of declaration, or even obtain a rule for time to declare against one only, without proceeding against the other (*t*). Or if he have holden two defendants to bail on a joint writ, and declare against one only, the bail will be discharged; and if he declare against both severally, the Court would set aside the declaration for irregularity (*u*). But where process in an action for a tort as for an assault was against two defendants, and both were holden to bail under a Judge's order, and the plaintiff afterwards declared against one of them only, the Court held that he might do so without discharging the bail (*x*), provided he dropped his proceedings against the other entirely (*y*). And upon nonbailable process the plaintiff may declare against one defendant only, although several be joined in the writ, provided the cause of action be separate, and provided he drop the proceedings against the others (*a*). If the writ be at the suit of one plaintiff only, and the declaration at the suit of two, the Court will, either in bailable or non-bailable cases, set aside the declaration and proceedings thereon for irregularity (*b*), and in bailable cases order an *exoneretur* to be entered on the bail piece.

(*q*) *Thompson v. Macirone*, 4 D. & R. 619, 3 B. & C. 1, S. C.

(*r*) *Edwards v. Carter*, 1 Str. 473; and see *ante*, p. 102, 187; *Thompson v. Cotter*, 1 M. & S. 55; *Haigh v. Conway*, 15 East, 1.

(*s*) *Roe v. Cock*, 2 T. R. 257.

(*t*) *Id.*

(*u*) *Thompson v. Cotter*, 1 M. & S. 55; *Moss v. Birch*, 5 T. R. 722; *Jonge v. Murray*, 1 Marsh. 274; and see the rule of M. T. 3 W. 4, r. 1, *ante*, 187, and

*ante*, 102.

(*x*) *Wilson v. Edwards*, 5 D. & R. 622, 3 B. & C. 734, S. C.

(*y*) *Ante*, 102, 188; *Evans v. Whitehead*, 2 M. & R. 367.

(*a*) *Evans v. Whitehead*, 2 M. & R. 367; *Bowles v. Bilton*, 2 Crom. & J. 174; *Holland v. Johnson*, 4 T. R. 695; *Comyns*, 74; *Spencer v. Scott*, 1 B. & P. 19, 49; *ante*, 188.

(*b*) *Rogers v. Jenkins*, 1 B. & P. 383.

*In what cases to be delivered.*] In all cases where special bail is put in, or an appearance is entered by the defendant, a copy of the declaration must be delivered to the defendant's attorney; but, if the abode of the defendant's attorney be unknown to the attorney of the plaintiff, such copy may be left with the clerk of the declarations, and notice thereof given to the defendant. (*R. T. 2 G. 2; and see R. T. 12 W. 3*) (*c*). The delivery, when accompanied with the notice to plead, as is usual, must take place before 9 o'clock at night, (*R. H. 2 W. 4, r. 50*), but without such notice, it may, it seems, be delivered as late as 10 o'clock. (*R. M. 41 G. 3*). The old rules of *T. T. 12 W. 3*, and *T. T. 2 G. 2*, requiring the defendant's attorney to pay for the copy of the declaration on delivery, are, in practice, quite obsolete, and are virtually repealed by the rules of *H. T. 35*, and *M. T. 36 G. 3*, which, although "issue-money" only is mentioned therein, the Court have determined extend to all pleadings (*d*).

*In what cases to be filed.*] The declaration must be filed with the clerk of the declarations, where the defendant has not appeared by putting in special bail, or entering an appearance; or where an appearance is entered by the plaintiff for the defendant. (*R. T. 1 G. 2*).

*Notice of filing it, &c.*] Where the declaration is thus filed, notice of its being so filed must be given to the defendant, by leaving such notice at his last or most usual place of abode (*R. T. 1 G. 2*), and to all the defendants, if more than one (*e*); in all other cases, it must be given to the defendant or his attorney (*R. T. 2 G. 2*) (*f*); or, if his last or most usual place of abode be unknown (by leave of the Court or a Judge, but not otherwise), the notice may be stuck up in the office (*R. H. 2 W. 4, r. 49*) (*g*); and, to induce the Court, or a Judge, to allow the notice to be so stuck up in the office, you must shew, on affidavit, that the most satisfactory inquiries have been made after the defendant (*h*), and the particulars of such inquiries must be stated in the affidavit. The rule of Court allowing this notice to be so stuck up is absolute in the first instance (*i*). A personal service of the notice is in no case necessary (*j*). It may be served at any time before a *nonpros* is actually signed, and within the year after the return of the process (*k*). It must not, however, be served on a Sunday (*l*); nor after nine o'clock at night (*R. H. 2 W. 4, r. 50*).

(*c*) *Hindford, Earl of, v. Charteris*, 2 L. Raym. 1407; Tidd, 9th ed. 452.

(*d*) Tidd, 9th ed. 452.

(*e*) *Coulson v. Turnbull*, Barnes, 246; *Kingdon v. Horn*, Barnes, 293.

(*f*) Pract. Reg. 129.

(*g*) See form of affidavit, Chit. Forms, 108. See also the former cases of *Oldham v. Burrell*, 7 T. R. 26; *Holsten v. Culliford*, 1 B. & P. 214; *Weller v. Robinson*, 1 Taunt. 433; *Loemore v. Cohen*, 1 New Rep. 279.

(*h*) Ball Court, MS. K. B. 3rd Nov. 1832.

(*i*) *Bridger v. Austin*, 1 Dowl. P. C. 272.

(*j*) *Simmons v. Shannon*, 2 W. Bl. 725, 3 Wils. 147, S. C.

(*k*) *R. H. 2 W. 4, r. 35; Worley v. Lee*, 2 T. R. 112; *West v. Radford*, 3 Burr. 1452; *ante*, 186.

(*l*) *Morgan v. Johnson*, 1 H. Bl. 628; *Roberts v. Monkhouse*, 8 East, 547.

*R. M.* 41 *G.* 3); nor can it be served on any day between the 10th August and 24th October. (2 *W.* 4, c. 39, s. 11).

The notice must specify the nature of the action, at whose suit prosecuted, the time limited for pleading, and state, that unless the defendant plead within the time so limited, judgment will be entered against him by default. (*R. T.* 1 *G.* 2) (*m*). Upon a writ against two, where the declaration is against one only, notice of such declaration intituled as against both is bad (*n*). When the declaration is filed *de bene esse*, the notice should state that circumstance; yet, although omitted, the Court have holden the notice to be sufficient (*o*). It need not specify the amount of damages. (*R. H.* 2 *W.* 4, r. 41). It seems no date is necessary (*p*).

The declaration is deemed filed only from the service of the notice (*R. T.* 1 *G.* 2; *R. T.* 2 *G.* 2) (*q*); therefore, a rule to plead, or the like, before notice of declaration, would be irregular (*r*). And if this notice be irregular, and the plaintiff sign judgment for want of a plea, the Court will set aside the judgment for the irregularity (*s*).

It must be observed, that, by taking the declaration out of the office, you waive all objections to the process (*t*), and to any variance between the notice of declaration and the declaration itself (*u*), and also to the declaration having been filed conditionally instead of absolutely. The defendant has always allowed him the opportunity of seeing the exterior of the declaration. (*Ante*, 185).

If the declaration be filed, the defendant cannot take it out of the office without paying for it, nor will he be allowed to plead without taking it out (*v*). By ruling a defendant to plead, and demanding a plea, therefore, you compel him to pay for the declaration; for, if he do not take the declaration out of the office, and plead within the time limited for that purpose, judgment may be signed as for want of a plea (*x*).

*Particulars of demand.*] By the rule of *T. T.* 1 *W.* 4, r. 6, the plaintiff must, with every declaration (if delivered), or with the notice of declaration (if filed), containing any common *indebitatus* counts, deliver full particulars of his demand, under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he must deliver such a statement of the nature of his claim, and the amount of

(*m*) *Sams v. Culham*, 9 B. & Cres. 370; *Cooke v. Johnson*, 1 Dowl. P. C. 247; *Robins v. Richards*, Id. 378; *Graves v. Wise*, 2 Wils. 84; *Hetherington v. Hobson*, 6 Taunt. 331; *Bartholomew v. Goulding*, Barnes, 291; *Taylor v. Sherman*, Id. 299, 409; *Prac. Reg.* 131, 133, 134, 135. See the forms, *Chit. Forms*, 107.

(*n*) *Evans v. Whitehead*, 2 M. & R. 367. See *post*, Vol. 2, Book 4, Part 1, Chap. 35, as to the titles of affidavits.

(*o*) *Ort v. Jacques*, 8 T. R. 77, *Watkins v. Woolley*, 8 Taunt. 644, 2 Moore, 719, S. C. See *ante*, 184.

(*p*) *Anon.* 2 Chit. Rep. 238.

(*q*) *Hutchinson v. Brown*, 7 T. R. 298; *Weddle v. Brazier*, 1 C. & M. 69, 1 Dowl. P. C. 639, S. C.; and see *Robertson v. Douglas*, 1 T. R. 191.

(*r*) *Prac. Reg.* 131; *Grey v. Saunders*, Barnes, 248. See *Worley v. Lee*, 2 T. R. 112; *West v. Radford*, 3 Burr. 1452.

(*s*) *Graves v. Wise*, 2 Wils. 84; *Bartholomew v. Goulding*, Barnes, 291.

(*t*) *Caswall v. Martin*, 2 Str. 1072.

(*u*) *Robins v. Richards*, 1 Dowl. P. C. 378.

(*v*) See *White v. Dent*, 1 B. & P. 341.

(*x*) See *Keeling v. Newton*, 1 Wils. 173; *post*, 203, 204.

the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all *such cases*, it is thereby further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And it is thereby also further ordered that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the Judge's Marshal.

As to the form and other requisites of the particulars, *see post*, Vol. 2, Book 4, Part 1, Chap. 15.



## SECT. 2.

*The Plea, &c. (a).*

1. *Notice to plead, and Time to plead*, 193 to 196.
2. *Rule to plead*, 196.
3. *Demand of a Plea*, 197.
4. *Further Time to plead*, 198 to 201.
5. *Judgment for want of a Plea*, 201 to 206.
6. *The Plea, how filed or delivered, and herein of General Pleas, Special Pleas, Double Pleas, Withdrawing Pleas, and Adding Pleas, &c.* 206 to 211.

1. *Notice to plead, and Time to plead.*

Before the defendant can be compelled to plead, or the plaintiff sign judgment for want of a plea, three things are necessary: a notice to plead; a rule to plead; and, in some cases, a demand of a plea. These shall now be considered in their order.

And first, of the notice to plead: this is necessary in all cases, before the plaintiff can sign judgment for want of a plea (b). It is usually indorsed on the declaration when delivered; (*see R. T. 5 & 6 G. 2; R. M. 10 G. 2, r. 2*); but may be given on a separate paper, and served subsequently to the delivery of the declaration (c); and where the declaration is filed, as the notice to plead is contained in the notice of filing the declaration, it is not necessary to indorse it on

(a) As to pleas in abatement, *see post*, Vol. 2, Book 2, Part 1; Particulars of Plaintiff's Demand, *ante*, 192, and *post*, Vol. 2, Book 4, Part 1, Chap. 15; *Oyer, post*, Vol. 2, Book 4, Part 1, Chap. 13; *Changing Venue, post*, Vol. 2, Book 4, Part 1, Chap. 6; *Paying Money into*

*Court, post*, Vol. 2, Book 4, Part 1, Chap. 9.

(b) *See Heath v. Rowe*, 2 New Rep. 223; Tidd, 9th ed. 473.

(c) *Anon.* 2 Wils. 13 *See West v. Radford*, 3 Bur. 1452.



the declaration. (*Ante*, 184). Where the declaration was indorsed "to plead in ———," the Court of Common Pleas held that it should be understood to mean within the number of days allowed by the rules of the Court (*e*). It should seem that if the notice be to plead within a greater number of days than the practice requires, the defendant would have the time given by the notice.

The only matter remaining to be considered under this head, is the time limited for pleading, and which must be specified in the notice to plead.

*Time for pleading.*] If the plaintiff declare *absolutely*, the notice must be to plead within four days, if the venue be laid in London or Middlesex, and the defendant reside within twenty miles of London; or within eight days, if the venue be laid in any other county, or the defendant reside above twenty miles from London (*f*); and in default of pleading, as aforesaid, the plaintiff may sign judgment. (*R. T.* 5 & 6 *G.* 2). In a case where the defendant, who usually resided in Scotland, was arrested in London, the Court held that four days' notice was sufficient (*g*). In actions against attornies, the defendant has only four days to plead, after delivery of a copy of the declaration wherever the venue is laid, and whether he resides within twenty miles of London or not (*h*).

If the plaintiff declare *de bene esse* (as he may do upon *bailable* process), the notice must be to plead within four days, if the action be laid in London or Middlesex, and the defendant reside within twenty miles of London; or within eight days, if the action be laid in any other county, or the defendant live above twenty miles from London; and if the defendant put in bail, and do not plead within the time herein limited, plaintiff may sign judgment for want of a plea. (*R. T.* 22 *G.* 3). If the defendant were to plead before bail was put in and perfected, the plaintiff might treat the plea as a nullity, and sign judgment, even although the bail were afterwards to justify (*i*); except in the case of a plea in abatement, which may of course be pleaded before justification, otherwise the plaintiff might have it in his power to prevent the defendant from pleading such a plea, by not excepting to the bail before the time limited for pleading in abatement should have expired (*k*).

In cases where the declaration has been filed, these four or eight days are reckoned from the service of the notice of declaration, and not from the time of filing it (*l*).

(*e*) *Hifferman v. Langelle*, 2 B. & P. 363.

(*f*) *R. T.* 5 & 6 *G.* 2; and see *Holland v. Cooke*, 1 M. & Sel. 566.

(*g*) *Douglas v. Ray*, 4 T. R. 553, n. See the cases, *post*, 223, as to notice of trial.

(*h*) *Mann v. Fletcher*, 5 T. R. 369. It seems that the 2 W. 4, c. 39, does not alter this practice.

(*i*) *Venn v. Calvert*, 4 T. R. 578. See *post*, 198, 204, 205.

(*k*) *Dimsdale v. Nielson*, 2 East, 406; *Saunders v. Owen*, 2 D. & R. 252, *post*, Vol. 2, 470; *Copen v. Bond*, 2 Y. & J. 531; *Hopkinson v. Henry*, 13 East, 170.

(*l*) *Hutchinson v. Brown*, 7 T. R. 298; *Weddle v. Brown*, 1 C. & M. 69, and *ante*, 192.

These four or eight days are reckoned exclusive of the day of giving the notice, and inclusive of the last day, unless the last day be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case they will be reckoned exclusively of that day also. (*R. II. 2 W. 4, r. viii.*)

It is also to be observed, that no plea can be filed or delivered *between the 10th of August and the 24th of October*, (2 *W. 4, c. 39, s. 11*); and in case the time for pleading to the declaration does not expire before the 10th of August, the defendant has the same number of days for that purpose after the 24th of October as if the declaration had been delivered or filed on the 24th of October; but in such case it will not be necessary for the plaintiff to give a fresh rule to plead. (*R. M. 3 W. 4, r. 12.*)

*Imparlanee.*] Formerly, unless the plaintiff declared within certain prescribed times, the defendant was entitled to an imparlanee, or, in other words, the defendant was allowed another term to plead in. But since the 2 *W. 4, c. 39*, it is conceived, that, in actions commenced by the process prescribed by that act, these imparlanes are wholly put an end to (*m*).

*Term's notice.*] To prevent surprise on the defendant, if four terms have elapsed since the delivery or filing of the declaration, the defendant must have an entire term's notice to plead, before judgment can be signed for want of a plea, unless the cause have been stayed by injunction or privilege (*n*), or at the defendant's request (*o*). This notice must be given before the first day of the term (*p*); and a rule to plead may be entered, and judgment signed, at any time in the following vacation, as of the preceding term (*q*).

*After delivery of oyer, particulars, &c.*] Where oyer has been demanded, the defendant shall have as many pleading days after it is granted, as he had when he demanded it (*r*); as, if he had four days originally to plead, and after two days had elapsed he craved oyer, he shall have two days, after the delivery of oyer, to plead. So, the defendant has the same time to plead, after the delivery of a bill of particulars, as he had when the summons for it was returnable; nevertheless, judgment must not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge. (*R. II. 2 W. 4, r. 48*) (*s*). Where a summons for better parti-

(*m*) They may, it seems, still exist in actions not so commenced; and see *post*, Vol. 2, Book 3, Part 1, Chap. 3, as to the imparlanee in proceedings by *scire facias*; and *post*, Vol. 2, Book 3, Part 1, Chap. 2, as to the imparlanee in the action of replevin; and *post*, Vol. 2, Book 4, Part 1, Chap. 4, as to the imparlanee in actions removed from inferior Courts.

(*n*) *R. T. 5 & 6 G. 2; Hayley v. Riley*, 1 Doug. 72.

(*o*) *Bland v. Darley*, 3 T. R. 530; *Watkins v. Haydon*, 2 Bla. R. 762.

(*p*) *Bogg v. Rose*, 2 Str. 1164; *Price v. Hughes*, 1 Dowl. P. C. 448.

(*q*) *Milbourne v. Nixon*, 2 T. R. 40. See the form of the notice, *Chit. Forms*, 110.

(*r*) *Webber v. Austin*, 8 T. R. 356.

(*s*) *Mowbray v. Schuberth*, 13 East, 508; *St. Hanlaire v. Byum*, 4 B. & C. 970, 7 D. & R. 458, S. C.

culars was obtained by defendant *four* days before the time for pleading expired, but the plaintiff's attorney did not attend till the third summons, and the order being then refused, and the time originally allowed for pleading having expired, he signed judgment for want of a plea; the Court held, that, as the delay was occasioned by the plaintiff's attorney, the judgment was signed too soon, and was therefore irregular (*z*). But where an order for particulars, and an order for time to plead have been obtained, the time for pleading will run, although no particulars are given, unless it is expressed in the order for time to plead, that it is not to begin to run until after the delivery of the particulars (*u*). After changing the venue, the defendant must plead to the altered declaration, as he should have done to the other, without delay. (*R. M.* 1654, s. 5).

*After amendment.*] If the plaintiff amend his declaration, the defendant shall have two days (exclusive of the day of amendment and after payment of costs), to alter his first plea, or plead another; (*R. T.* 5 & 6 G. 2; *R. M.* 10 G. 2, r. 2) (*x*). Any plea he may have pleaded, if applicable to the amended declaration, cannot be considered at an end, so as to entitle the plaintiff to sign judgment if new pleas are not pleaded to it (*y*); but it would be otherwise if the plea would not be so applicable. A new rule to plead is not in any case of amendment necessary. (*R. H.* 2 W. 4, r. 42) (*z*). Nor is a demand of plea, if the amendment were after plea pleaded (*a*).

## 2. Rule to plead.

The next thing requisite is the rule to plead. This must be entered in all cases, whether the defendant have appeared or not; unless he be bound by a rule of court, or a Judge's order, to plead within a limited time; (*R. T.* 5 & 6 G. 2) (*b*); or unless the defendant dispense with it, by pleading in bar or in abatement, before a rule to plead is given (*c*). As to a rule to plead to an amended declaration, *vide supra*.

*Make out a memorandum of the rule on plain paper* (*d*). *Take it to the clerk of the rules, and he will enter it in a book kept for that purpose; pay him 6d.*

(f) *Glover v. Watmore*, 5 B. & C. 769, 8 D. & R. 607, S. C.

(u) *Adams v. Drummond*, 1 Dowl. P. C. 99; *post*, 199.

(r) See *Woodroffe v. Watson*, 6 Taunt. 400, and the rule in C. P. E. T. 1 W. 4, r. 2. Before the 2 W. 4, c. 39, instead of receiving costs, it was said he might, at his option, have an imparlance. *Lee-hill v. Reynell*, 2 Str. 950; but see *R. M.* 1654, sect. 13; *Pract. Reg.* 18.

(y) *Fagg v. Borsley*, 2 Dowl. P. C. 107; *Huckvale v. Kendal*, 3 B. & Ald. 137.

(z) See *per Bayley, J.*, in *Fagg v. Borsley*, 2 Dowl. P. C. 108. See the prior rule and cases, *R. M.* 10 G. 2, r.

2; *R. E.* 1 W. 4, C. P.; 2 Salk. 520, 517; *Blunt v. Morris*, 2 W. Bl. 785; *Barton v.*

*Moore*, 8 T. R. 87.

(a) *Huckvale v. Kendal*, 3 B. & Ald.

137.

(b) *Nias v. Spratley*, 4 B. & C. 306, 6 D. & R. 390, S. C.; *Towes v. Powell*, 1 H. Bl. 87; and see *Pearson v. Reynolds*, 4 East, 571, 1 Smith, 288, S. C.; *Decker v. Shedden*, 3 B. & P. 180; *Donne v. Marsh*, 7 Taunt. 587, 1 Moore. 320, S. C.

(c) *Brandon v. Payne*, 1 T. R. 689; *Lockhart v. Mackreth*, 5 T. R. 663; and see *Perry v. Fisher*, 6 East, 549.

(d) See the form, *Chit. Forms*, 109, and of the rule, *Id.*

A rule to plead cannot be entered before the declaration is delivered, or filed and notice given, or it will be irregular (*e*); yet if the defendant in such a case plead, he will thereby waive the irregularity (*f*). But it may be entered at any time on or after the day on which the declaration is delivered or filed (*g*), and where expedition is desirable, care should be taken to enter it four days exclusive before the expiration of the time limited for pleading. Before the 2 W. 4, c. 39, it must have been entered in term time (*h*); but this is no longer requisite in actions commenced by the process prescribed by that act; nor need it be given of the term of which judgment is signed (*i*). It may be entered after demand of plea (*j*).

This rule expires in four days exclusive; (*R. T. 1 G. 2; R. H. 2 W. 4, r. VIII., ante, 58*); and Sunday is reckoned, unless it happen to be the last day of the four (*Id.*) (*k*); and the same of *dies non juridicus* holidays, as Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving (*Id.*) (*l*), on which the Court do not sit.

If this rule expire before the time limited for pleading has elapsed, still the plaintiff cannot sign judgment for want of a plea, until the day after the time to plead has expired. But if it expire at the same time with the time for pleading, or after it, the plaintiff may sign judgment the day after the rule to plead expires. (*See R. H. 2 G. 2, r. 3*). If the rule, however, expire on a Sunday, or *dies non juridicus*, the defendant has all the following day to plead (*m*). And in case the time for pleading has not expired before the 10th August, the defendant, we have seen, *ante, 195*, has the same number of days for pleading after the 24th October, as if the declaration had been delivered or filed on the 24th October, and in such case no new rule to plead is necessary. (*R. M. 3 W. 4, r. 12*).

As to when the plaintiff may sign judgment for want of a plea, *see post, 201, 202.*

### 3. Demand of a Plea.

In all cases where the defendant has appeared or put in bail, the plaintiff must demand a plea, before he can sign judgment (*n*). This demand, however, cannot be made before the defendant has appeared (*o*). It is not necessary to make it where the plaintiff has entered an appearance for the defendant (*p*), or where the defendant is bound by a Judge's order to plead within a limited time (*q*), or where

(*e*) *Perry v. Fisher*, 6 East, 549.

(*f*) *Id.*

(*g*) *See Shadwell v. Angel*, 1 Bur. 55.

(*h*) *Milbourne v. Nixon*, 2 T. R. 40; Tidd, 421.

(*i*) *Ryer v. Smith*, 2 Dowl. P. C. 114; *Mould v. Murphy*, *Id.* 54, 1 C. & M. 495, S. C.

(*j*) *Maxwell v. Skerrett*, 5 East, 547.

(*k*) *Asmole v. Goodwin*, 2 Salk. 624; *Anon.* 1 Str. 86; *Wathen v. Beaumont*, 11 East, 272.

(*l*) *Harrison v. Smith*, 9 B. & C. 243.

(*m*) *Anon.* 1 Str. 86; *Harrison v. Smith*, 9 B. & C. 243; *ante, 58*.

(*n*) *Nott v. Oldfield*, 1 Wils. 134;

*Eames v. Jew*, Barnes, 276; *White v. Dent*, 1 B. & P. 341; and see *Harvey v. Goodford*, 8 Taunt. 33, 1 Moore, 464, S. C.

(*o*) *Martin v. Mahony*, 5 D. & R. 609; *Cook v. Raven*, 1 T. R. 635; see 1 Selton, 304. But it seems, that if defendant's attorney has not appeared according to his undertaking, a plea may be demanded before appearance. *Imp. C. P.* 281.

(*p*) *R. T. 1 G. 2; Free v. Mason*, 5 B. & C. 763; *Pulke v. Rendle*, 8 T. R. 465; *North v. Lambert*, 2 B. & P. 218; Barnes, 177; and see *Shadwell v. Angel*, 1 Bur. 55.

(*q*) *Pearson v. Reynolds*, 4 East, 571; *Baker v. Hall*, 1 Taunt. 538.

the declaration has been amended after plea pleaded (*r*). Before the late rule of *T. T. 3 W. 4*, it was not necessary to make this demand where the defendant was in the custody of the sheriff (*s*), in the same suit (*t*): but by that rule the demand must be made in this as in other cases. If the plaintiff demand a plea, before special bail is put in, it will be a waiver of bail, unless in cases where time to justify has been given conditionally; (*ante*, 150); or if bail be put in, a demand of plea before justification will be a waiver of justification. (*Ante*, 164). So, if the plaintiff demand a plea before the defendant has appeared, and the defendant accordingly plead before appearance, the plaintiff cannot treat the plea as a nullity, and sign judgment (*u*); although it would be otherwise if the defendant had so pleaded before a demand of plea given (*x*).

The demand must be in writing (*y*), and delivered by the plaintiff's attorney to the attorney or agent of the defendant (*z*), or it may be indorsed on the declaration. (*R. II. 2 W. 4, r. 43*) (*a*). Sticking the demand up in the King's Bench office will not do, and this although the defendant keep out of the way (*b*). It may be made before a rule to plead given (*c*). It may be made at the time of delivering the declaration (*d*).

The plaintiff cannot sign judgment for want of a plea, until the opening of the office in the afternoon of the day after that on which the demand was made, (*R. II. 2 W. 4, r. 66*), although the time for pleading and the rule to plead have expired (*e*). But he may sign it then, or at any time after, provided the time for pleading and rule to plead be out (*f*), and the defendant has not pleaded and apprized the plaintiff thereof. (*Post*, 202). Sunday, or a *dies non juridicus* (*g*), is not included in this time; therefore, if the demand be made on Saturday, judgment cannot be signed until the opening of the office in the afternoon of the Monday following (*h*).

The demand of a plea will be waived by the defendant's pleading without it. Therefore, if a defendant plead before a demand is made, and his plea be a nullity, the plaintiff may sign judgment (*i*), as soon as the time for pleading has expired. (*Post*, 202). In one case, the Court set aside the judgment, the plea having been put in without

(*r*) *Huckvale v. Kendal*, 3 B. & Ald. 137.

(*s*) *Ross v. Christfield*, 1 T. R. 591; *Wilkinson v. Bruzon*, 6 Id. 524.

(*t*) *Remington v. Johnson*, 2 B. & C. 803. But it must have been made when he was in the custody of the marshal, and notice thereof had been given to the plaintiff.

(*u*) *Martin v. Mahoney*, 5 D. & R. 609.

(*v*) See *Cook v. Raven*, 1 T. R. 635; *Venn v. Culbert*, 4 T. R. 578; *ante*, 194, 197; *post*, 204, 205.

(*y*) *Nott v. Oldfield*, 1 Wils. 134.

(*z*) See the form, Chit. Forms, 110.

(*a*) *Maxwell v. Skerrett*, 5 East, 547.

See the form, Chit. Forms, 109.

(*b*) *Anon.* 1 Dowl. P. C. 68, 23.

(*c*) *Maxwell v. Skerrett*, 5 East, 547.

(*d*) *Churchwardens of Edmonton v. Osborne*, 6 T. R. 689; *Rundell v. Champ-*

*neys*, 1 D. & R. 196. It was never necessary that this demand should be made as of the term judgment for want of a plea was signed; *Sweet v. John*, 1 Chit. Rep. 735, n.; MS. E. 1825; as was the case with the rule to plead, *ante*, 196. It never could be made before the defendant had appeared. *Cook v. Raven*, 1 T. R. 635; *ante*, 197.

(*e*) *Dyche v. Burgoyne*, 1 T. R. 454; *Bowles v. Edwards*, 4 T. R. 118.

(*f*) *Dyche v. Burgoyne*, 1 T. R. 454; *vide post*, 202.

(*g*) *Ante*, 58, and see *Harrison v. Smith*, 9 B. & C. 243.

(*h*) *Solomons v. Freeman*, 4 T. R. 557.

(*i*) *Lockhart v. Mackreth*, 5 T. R. 661; *Perry v. Fisher*, 6 East, 549; *Bond v. Smart*, 1 Chit. Rep. 735, in which case defendant pleaded without taking declaration out of the office.

authority, by a new attorney for the defendant, without an order for changing the former attorney (*l*).

#### 4. Further Time to plead.

*When and how obtained.*] If, from circumstances, a further time to plead become necessary, the defendant may obtain it, upon summons, if the judge in his discretion think it reasonable that it should be granted. And where it became necessary to file a bill for a discovery in a Court of equity, for the purpose of establishing a defence to an action, the Court gave the defendant time to plead until the next term, that he might have an opportunity, in the mean time, of obtaining this discovery (*m*). So, in an action for words imputing murder, the Court gave time to plead until the next term, upon the ground that the plaintiff was to be tried for the murder in the mean-time, upon an indictment then pending against him (*n*).

To obtain further time to plead, *apply for a Judge's summons for that purpose* (*o*); *serve it on the plaintiff's attorney or agent, who will probably attend the first summons, (for, by waiting for a second, he would be merely delaying himself); and will in general consent to an order, unless he have sufficient grounds for objecting to it* (*p*). *Serve a copy of the order as you did the summons; for unless it be served, the plaintiff is not bound to notice it, but may sign judgment for want of a plea* (*q*). It should be observed, that where an order for particulars, and an order for time to plead, have been obtained, the time for pleading will run although no particulars are given, unless it is expressed in the order for time to plead that it is not to begin to run till after the delivery of particulars (*r*). In such cases, therefore, take care and state in the order that the time shall not expire until "after a delivery of particulars." Care should be taken that the first summons be *attendable* before the time at which the plaintiff is at liberty to sign judgment, supposing no summons to have been taken out; otherwise it will not stay the signing of judgment (*s*). But if the plaintiff omit signing judgment in such case before such summons is attendable, he cannot sign it afterwards, it being a rule that if the summons be returnable before judgment is signed, it prevents the plaintiff from afterwards signing it (*t*).

The time to be given is entirely in the discretion of the Judge. If it be a month, it is to be considered a lunar month, consisting of four weeks (*u*). It is reckoned exclusive of the day of the order, but inclusive of the day on which it expires (*w*). And if the defendant do

(*l*) *Perry v. Fisher*, 6 East, 549.

(*m*) *Whitter v. Cazalet*, 2 T. R. 683.

(*n*) *Sibson v. Nivins*, Barnes, 224.

(*o*) See the form, *Chit. Forms*, 110.

(*p*) See the practice as to summonses and orders, Vol. 2, Book 4, Part 1, Chap. 34; and see the form of the order, *Chit. Forms*, 110.

(*q*) *Sedgwick v. Allerton*, 7 East, 542, 3 Smith, 559, S. C.; and see *Jane v. Hutton*, 1 W. Bl. 290.

(*r*) *Adams v. Drummond*, 1 Dowl. P.

C. 89.

(*s*) *Ottwell v. D'Aeth*, Barnes, 254; Say. 165; Ca. Pr. C. B. 137, 142; and see Barnes, 225; Ca. Pr. C. B. 144.

(*t*) *Morris v. Hunt*, 2 B. & Ald. 355, 1 Chit. Rep. 93, S. C.

(*u*) *Tullett v. Linsfield*, 3 Bur. 1455, 1 W. Bl. 540, S. C.; 1 B. & P. 479.

(*w*) R. H. 2 W. 4, r. 8, *ante*, 58; and see MS. T. T. 1827, Tidd, 9th ed. 470, S. C. See 8 Taunt. 592, 2 Moore, 695, S. C.

not plead on or before the day on which the time expires, the plaintiff may sign judgment on the morning of the following day, without giving any new rule to plead, or demanding a plea. (*See ante*, 196, 197).

If the defendant afterwards file his plea before the time thus given him, he cannot rule the plaintiff to reply before the expiration of such time, unless he have previously given the plaintiff a notice of the plea being filed (*x*); and such notice, it seems, cannot be served on a Sunday (*y*).

After having thus obtained time to plead, the defendant may again obtain further time, if the judge deem it reasonable that it should be granted.

*Upon what terms, and their consequences.*] The order is usually drawn up upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial or inquiry (if necessary) within the term (*z*). But it is entirely discretionary with the Judge to exact these terms or not; and they are consequently exacted only in cases where the Judge, in his discretion, thinks it reasonable that the plaintiff should not experience any inconvenience or injury, likely otherwise to arise to him, from the indulgence thus granted to the defendant. Also, if the defendant be an executor or administrator, the order usually requires that he shall not plead any judgment which may be obtained against him since the time for pleading expired (*a*); otherwise a plea of such judgments, being an issuable plea, might be pleaded by him (*b*).

By pleading "issuably" is meant, not a general issue only (*c*); but any other plea upon which the plaintiff may take issue, and go to trial upon the merits (*d*). In a late case, Abbott, C. J., said, that the general rule was "that where a party has obtained time to plead on the terms of pleading issuably, and by his pleading fails to bring the merits of the case, or some question of fact, or some question of law, arising on the facts in issue, he does not comply with the conditions of the order" (*e*). A plea in abatement (*f*), or a plea of alien enemy (*g*), is not an issuable plea, within the meaning of a Judge's order for time to plead; nor is a plea of judgment recovered, if false, considered such (*h*): but a plea of tender (*i*), of the statute of limitations (*k*), and of the statute 23 H. 6, c. 10, that a bail bond was given for ease and favour are (*l*). A general demurrer, if fairly and *bona fide* intended, is an issuable plea within the meaning of such an or-

(*x*) *Gandy v. Borrowdale*, 1 New Rep. 273.

(*y*) *Roberts v. Monkhouse*, 8 East, 547.

(*z*) 1 Sellon, 307.

(*a*) *Anon.* 8 Mod. 308.

(*b*) *Hughes v. Pellett*, Barnes, 330.

(*c*) *Deurden v. Holden*, 1 Bur. 605.

(*d*) *Foster v. Snow*, 2 Bur. 782; *Wagstaffe v. Long*, Barnes, 263; *Simsen v. Thompson*, 8 T. R. 71; *Thellusson v. Smith*, 5 Id. 152.

(*e*) *Sawtell v. Gillard*, 5 D. & R. 620.

(*f*) *Kilwick v. Maidman*, 1 Bur. 59;

Barnes, 263; and *the Dougal v. Bowman*, 2 W. Bl. 724, 3 Wils. 145, S. C.

(*g*) *Simsen v. Thompson*, 8 T. R. 71.

(*h*) *Heron v. Heron*, 1 W. Bl. 376; *Loufield v. Jackson*, 2 Wils. 117; *Cave v. Aaron*, 3 Id. 33.

(*i*) *Noone v. Smith*, 1 H. Bl. 369; *Kilwick v. Maidman*, 1 Bur. 59.

(*k*) *Rucker v. Hannay*, 3 T. R. 124, 4 East, 604, n. S. C.; *Maddocks v. Holmes*, 1 B. & P. 228. See *Stadtholme v. Hodgson*, 2 T. R. 390, *contra*.

(*l*) *Dearden v. Holden*, 1 Bur. 605.

der (*m*); but it seems a special demurrer (*n*), or a sham or frivolous demurrer, is not (*o*). But where a special demurrer in such a case was treated as a nullity, and judgment signed as for want of a plea, the Court, upon application, and upon its appearing that there were substantial grounds of demurrer, set aside the judgment, the defendant undertaking to strike out the special causes (*p*). The defendant is also considered as precluded by the order from demurring specially and frivolously to the replication (*q*).

By rejoining gratis is meant, not only as dispensing with the common four-day rule to rejoin (*r*), but also with all the consequences of that rule; so that the defendant must, even without a rule to rejoin or demand of rejoinder, rejoin within twenty-four hours after the filing or delivery of the replication (*s*).

By short notice of trial, is meant, in country causes, a notice four days at least before the commission day, the one day exclusive, the other inclusive; (*R. E.* 30 *G.* 3. *R. H.* 2 *W.* 4, *r.* 8); in town causes, two days' notice seems sufficient (*t*), although it is usual to give as much more as the time will admit of (*u*). If the terms be, to take short notice of trial for the sittings *in term*, the defendant is not thereby bound to take short notice of trial for the sittings *after term* (*v*). And the defendant's being under terms to take short notice of trial, does not entitle the plaintiff to give less than the usual notice of countermand (*x*).

Where a defendant, when under terms to plead issuably, pleads a plea which is not issuable, the plaintiff may treat it as a nullity, and sign judgment after the time for pleading has expired. (*Post*, 202). Or even, where he pleads several pleas, if any one of them be not issuable, that one will vitiate the others, and the plaintiff may sign judgment (*y*); and the same, where the defendant puts in a sham demurrer or the like, as to some of the counts in the declaration, and pleads issuably to the rest (*z*). But where the plea is merely informal, the plaintiff will not be allowed to sign judgment, but may demur (*a*); and in all cases where it is doubtful whether the plea be issuable or not, the better way is to move to set it aside. (*See post*, 204). If the plea be a nullity and not merely irregular, it seems no judgment of *nonpros* could be regularly signed for not replying to it (*b*). •

(*m*) *Wright v. Russell*, 2 *W. Bl.* 923, 3 *Wils.* 530, *S. C.*; *Dewey v. Sopp*, 2 *Str.* 1185.

(*n*) *Berry v. Anderson*, 7 *T. R.* 530; *Blick v. Dymoke*, 1 *Blng.* 379; *MS. H.* 1825; and see *Bell v. Da Costa*, 2 *B. & P.* 446; *sed vide Newnham v. Dowding*, 1 *Chit. Rep.* 711; *Holmes v. Hodgson*, 8 *Moore*, 379.

(*o*) *Gray v. Ashton*, 3 *Bur.* 1788; *Say*, 88.

(*p*) *Berry v. Anderson*, 7 *T. R.* 530.

(*q*) *Sawtell v. Gillard*, 5 *D. & R.* 620; *White v. Givens*, 6 *M. & S.* 415; but see *Dewey v. Sopp*, 2 *Str.* 1185, *Betts v. Applegarth*, 12 *J. B. Moore*, 501, 4 *Blng.* 267, *S. C.*; *R. T.* 5 & 6 *G.* 2.

(*r*) *Maurice v. Engler*, *Barnes*, 271;

and see *Wye v. Fisher*, 3 *B. & P.* 443.

(*s*) *MS. Exch.* 15th June, 1832.

(*t*) *Prac. Reg.* 390; *Butler v. Johnson*, 1 *Barnes*, 300.

(*u*) *Tidd*, 9th ed. 472. See *Price v. Simpson*, 1 *Taunt.* 343.

(*v*) *Tidd*, 757; and see *Abbott v. Abbott*, 7 *Taunt.* 452, 1 *Moore*, 160, *S. C.* *Blaauw v. Chaters*, 6 *Id.* 458, 2 *Marsh.* 151, *S. C.*

(*x*) *King v. Jones*, 1 *C. & M.* 71; *Sutton v. Barnett*, *Id.*

(*y*) *Waterfall v. Glode*, 3 *T. R.* 305; *Cuming v. Sharland*, 1 *East*, 411.

(*z*) *Id.*; *Sutton v. Waddilove*, *Barnes*, 314.

(*a*) *Theilussen v. Smith*, 5 *T. R.* 152.

(*b*) *Garratt v. Hooper*, 1 *Dowl. P. C.* 28.



## 5. Judgment for Want of a Plea.

*When, and in what cases.*] After the time specified in the notice to plead, and the four days after the rule to plead is entered, and the time allowed for pleading after the plea has been demanded, (where a demand is necessary), have severally expired, if the defendant have not delivered, entered, or filed a plea, or have delivered, entered, or filed a plea which is a nullity, the plaintiff may sign judgment. (See *ante*, 193, 194, 196, 197). The plaintiff may sign judgment on the morning of the day after the time limited for pleading has expired (c): We have seen, however, that by the rule of (*H. T. 2 W. 4, r. 66, ante*, 198), the plaintiff cannot sign judgment for want of a plea until the opening of the office in the afternoon of the day after that on which the demand of plea was made, but not before, although the time for pleading and rule to plead have severally expired. In actions not commenced by the process prescribed by the 2 W. 4, c. 39, if the notice indorsed on the declaration is to plead within the first four days of term, the defendant has all the morning of the fifth day to plead, and judgment cannot be signed before the opening of the office in the afternoon of that day (d). Though the defendant pleads irregularly, the plaintiff cannot, it seems, sign a judgment before the time for pleading is out (e); so if a plea is delivered or filed after the time at which the plaintiff is entitled to sign judgment but before judgment is signed, and of which the plaintiff's attorney is apprized, he would be irregular in afterwards signing such judgment (f).

We have already noticed the time defendant has to plead in, after oyer, or the delivery of particulars of demand (*ante*, 195). In the Common Pleas, where the plaintiff is ordered to find security for costs, he cannot sign judgment for want of a plea, until the opening of the office on the morning after the day on which he gives the security (g); but in this Court, the practice in these and the like cases is in general different, the defendant being allowed only the same time to plead after the security for costs given, &c. that remained to him at the time the summons was attendable, or the rule nisi served (*ante*, 195).

Where the defendant has obtained a further time to plead, if he do not plead within the time limited by the Judge's order, the plaintiff may sign judgment on the day after, without entering a rule to plead, or demanding a plea. (*Ante*, 196, 197).

If the defendant plead in abatement, or to the jurisdiction after the time limited for that purpose, (see *post*, Vol. 2, Book 2, Chap. 1), or, being under terms to plead issuably, plead a plea which is not issuable, (*ante*, 200), the plaintiff may consider the plea as a nullity, and after the time for pleading is expired, sign judgment.

So, if *nil debet* be pleaded to an action of *assumpsit* (h), or *non as-*

(c) *Duncan v. Carlton*, 4 D. & R. 391, 2 B. & Cres. 798, S. C.

(d) *Id.*

(e) *Nolleken v. Severn*, 1 Dowl. P. C. 320.

(f) *Amphill v. Semple*, 1 Dowl. P. C.

316, 2 C. & J. 358, S. C.; *Gray v. Pennell*, 1 Dowl. P. C. 120; *Mims v. Baxter*, 1 T. R. 17; see *vide Thomson v. Ryall*, 4 T. R. 195.

(g) *Decker v. Thomson*, 3 B. & P. 319.

(h) *Stafford v. Little, Barnes*, 237.

*sumpsit* to an action of debt (*k*), or a plea in abatement of the statute of additions, such plea not being available by the practice of the Court (*l*), the plaintiff may consider the plea a nullity, and sign judgment. But if the plea be "*not guilty*" to an action of *assumpsit* (*m*), or, "*not guilty*" to an action of debt on a penal statute (*n*), or that the defendant "did not undertake," omitting the words "*promise*," &c. in an action of *assumpsit* where the declaration alleged a promise (*o*), or *nil debet* to an action of debt on a judgment (*p*), it is not a nullity; nor will the omission of "*qui tam*," &c. to the plaintiff's name, in the title of the plea, in a penal action, warrant the plaintiff in signing judgment (*q*); nor will a misstatement of the defendant's christian name in the commencement of his plea (*r*). A plea in debt for 1800*l.* that defendant "does not owe the said sum ~~of~~ 10*l.* above demanded," &c. is, it seems, sufficient, and the amount may be rejected as surplusage (*s*). Nor, as the practice now exists, can a sham plea be considered a nullity, so as to warrant the plaintiff in signing judgment (*t*), unless it be palpably fictitious, and out of the regular course (*u*), though it is very probable that, in the course of a short time, the Courts will discountenance any sham plea whatever, and allow the plaintiff to sign judgment if pleaded. Where the defendant pleaded a judgment recovered of a term before the cause of action appeared to have accrued, and the plaintiff treated it as a nullity and signed judgment, the Court refused to set it aside, saying that, if defendants will plead judgments recovered, for the purpose of delay, let them at least take care that their pleas are good in form (*v*). So, where a plea of judgment recovered, good in form, was in like manner treated as a nullity, but it appeared that, previously to pleading it, the defendant had obtained an order to stay the proceedings upon payment of debt and costs, which he afterwards abandoned; as this shewed the plea to be palpably fictitious, the Court refused to set aside the judgment (*w*)\*. So, where sham pleas calculated to raise two or more issues requiring different modes of trial (*x*), or so ingeniously framed as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expense (*y*), have been pleaded,

(*k*) *Perry v. Fisher*, 6 East, 549; *Brennan v. Egan*, 4 Taunt. 164. See *Aaron v. Chaundy*, 2 B. & C. 562, 4 D. & R. 41, S. C.

(*l*) *Gray v. Sidneff*, 3 B. & P. 395; and see *Deshons v. Head*, 7 East, 383, 3 Smith, 363, S. C.; *Murray v. Hubbard*, 1 B. & P. 645; *Wills v. Howard*, 3 Taunt. 339.

(*m*) *Coggs v. Bernard*, 1 Salk. 26; *Marsham v. Gibbs*, 2 Str. 1022; *Hayne v. —*, 1 Chit. Rep. 715; *Davison v. Moreton*, Id. 715; *Ivemy v. Howard*, 1 Dowl. P. C. 453.

(*n*) *Coppin v. Carter*, 1 T. R. 462.

(*o*) *Smith v. Jones*, 3 D. & R. 621.

(*p*) *Anon.* 2 Chit. Rep. 239.

(*q*) *Dale v. Beer*, 7 East, 333, 3 Smith, 243, S. C.

(*r*) *Anon.* 7 D. & R. 511.

(*s*) *Attwood v. Bonacich*, 1 D. & R.

473; *Edgington v. Town*, 1 M. & P. 276; *Risdale v. Kelly*, 1 Dowl. P. C. 285, 1 C. & J. 410, 1 Tyrw. 387, S. C.; *see vide Macdonnell v. Macdonnell*, 3 B. & P. 174.

(*t*) *Webb v. Holt*, 2 Str. 1234.

(*u*) *Blewitt v. Murglen*, 10 East, 237; *Bell v. Alexander*, 6 M. & Sel. 134, 1 Chit. Rep. 625, S. C.; *see vide Hopgood v. Wright*, 2 New Rep. 188.

(*v*) *Lamb v. Pratt*, 1 D. & R. 577; *Phillips v. Bruce*, 1 Chit. Rep. 526, 6 M. & Sel. 134, S. C.; *Vere v. Carden*, 2 M. & P. 763, 4 Bingh. 413, S. C.

(*w*) *Hill v. Dyball*, MS. H. 1820, 2 Chit. Rep. 202, S. C.

(*x*) *Thomas v. Vandermoolen*, 2 B. & Ald. 197; *Bones v. Punter*, Id. 777, 1 Chit. Rep. 564, S. C.

(*y*) *Bartley v. Godslake*, 2 B. & Ald. 199; *Shadwell v. Berthoud*, 5 Id. 750, 1 D. & R. 446, S. C.; *Blewitt v. Marsden*,

The Court have allowed the plaintiff, upon producing affidavits that the pleas were wholly false, to sign judgment as for want of a plea. But in general, as the practice now exists, the Court will not interfere in this way, where the usual and ordinary sham plea is pleaded, merely upon an affidavit of its falsity (*z*), for that would, in effect, be trying the issue between the parties upon affidavit. Nor will they quash or set aside a plea which is merely defective (*a*), for this would be depriving the party of his writ of error. Where the defendant pleads a demurrable plea which appears to be a trick on the face of it, the Court will order it to be struck out, and compel defendant to plead another within a given time, and sometimes impose other terms on him (*b*), and this has been frequently ordered by Judges at chambers where the defendant has pleaded *nil debet* to debt on a record or specialty. In one case, it was decided that a plaintiff could not treat a sham plea as a nullity, after he had ruled the defendant to abide by his plea (*c*), but this has since been ruled otherwise (*d*). The demand of particulars of set-off delivered after a plea which was a nullity has been holden to be no waiver of the plaintiff's right to sign judgment (*e*). In some cases there may possibly be a difficulty in drawing a line between pleas which are a nullity, and those which are merely demurrable. In such cases it is in general safer to demur, or move the Court, or take out a summons to set aside the plea, than to sign judgment. Such application should be made within the time in which plaintiff, if he had replied to the plea, might have obtained judgment (*f*). In support of the application, there should be an affidavit of the falsity of the plea, if in fact false (*g*).

It seems that a Judge at chambers has no power to quash a demurrer, however sham and trivial; and that the defendant has the common law right of demurring, unless he be under terms to plead issuably (*h*).

The plaintiff may sign judgment if the defendant plead a tender, without paying the money into Court (*i*); or if he plead a dilatory plea, without an affidavit to verify it (*j*); or, after craving oyer, do not set forth all the condition of the bond, or set forth a false oyer, in his plea (*k*); or if defendant waive his plea or demurrer, without leave of the Court or a Judge (*l*).

10 East, 237; *Jones v. Studd*, 1 M. & P. 643, 4 Bingh. 633, S. C.; *Smith v. Hardy*, 8 Bingh. 435; *Miley v. Walls*, 1 Dowl. P. C. 648; and see *Hopgood v. Wright*, 2 N. R. 188; *Charles v. Marsden*, 1 Taunt. 225; *White v. Howard*, 3 Id. 33; *Samuels v. Dunne*, Id. 386.

(*c*) *Smith v. Beckwell*, 1 M. & P. 338, 4 Bingh. 512, 1 Bingh. 380, 8 Moore, 437, S. C.; *Merington v. Becket*, 2 B. & C. 81. See *Richley v. Proans*, 1 Id. 286, 2 D. & R. 661, S. C., *contra*. See also *Gaitskill v. Greadhead*, 1 D. & R. 359.

(*d*) See *Rex v. Cooke*, 2 B. & C. 618.

(*e*) *Jones v. Studd*, 4 Bingh. 663, 1 M. & P. 643, S. C.

(*f*) *Draycott v. Pilkington*, 5 M. & Sel. 518.

(*g*) *Thomas v. Vandermoolen*, 2 B. & Ald. 197.

(*h*) *Ford v. Bernard*, 6 Bingh. 534.

(*i*) *Poole v. Salter*, 1 Dowl. P. C. 297, 2 C. & J. 85, 2 Tyr. 139, S. C.

(*j*) *Bones v. Hunter*, 1 Chit. Rep. 564, 2 B. & Ald. 777, S. C.

(*k*) See *Foster v. Burton*, 1 Dowl. P. C. 683.

(*l*) *Pether v. Shelton*, 1 Str. 638.

(*m*) See *Hughes v. Alvarez*, 2 Ld. Raym. 1409; *Sherman v. Alvarez*, 1 Str. 639.

(*n*) *Wallace v. Cumberland*, *Duchess of*, 4 T. R. 370, 371, n.; and see *Cole v. Hulme*, 3 M. & R. 86, a.

(*o*) R. H. 2 W. 4, r. 46; *Palmer v. Dixon*, 5 D. & R. 623.

So, if there be any irregularity in the delivering or filing of the plea—as if the defendant plead *solvit ad diem*, and enter it in the general issue book, instead of delivering it to the plaintiff's attorney (*m*); or a plea in abatement, and deliver it, instead of filing it (*n*); or deliver any other plea which ought to be filed (*o*); or plead a double plea or avowry, or cognizance without a rule for that purpose, or plead a plea which ought to be signed by counsel, but is not so (*p*), the plaintiff may sign judgment. (*R. H. 2 W. 4, r. 34*).

If the defendant pleads before he has taken the declaration out of the office (if filed) plaintiff may sign judgment, and this without a demand of plea (*q*).

If the defendant, in bailable actions, plead before bail is put in and perfected, the plaintiff may treat the plea as a nullity, and sign judgment (*r*); unless in the case of a plea in abatement, which may be pleaded after bail put in and before justification. (*Ante, 194*). So, in nonbailable actions, if the defendant plead before he have entered an appearance, or an appearance entered for him, the plaintiff may treat the plea as a nullity, and, after the time for pleading has expired, sign judgment, unless he have waived his right of doing so by having previously demanded a plea (*ante, 198*), or the like.

Where the defendant first pleaded in abatement, and afterwards, without applying to the Court for leave to withdraw it, pleaded a judgment recovered, the Court held that the plaintiff was at liberty to sign judgment as for want of a plea (*s*).

If the plaintiff take the plea out of the office, he waives any objection to it, on the ground of its having been pleaded by a new attorney without an order to change the attorney (*t*).

Formerly, the judgment must have been signed of the same term the rule to plead was entered; otherwise, if the cause stood over to another term, without further proceedings, a new rule to plead must have been entered before the plaintiff could sign judgment, for judgments ought in general to be entered of the same term in which rules are given (*u*), but now in actions commenced by the process prescribed by the recent act of 2 W. 4, c. 39, such new rule to plead is not in that case necessary (*x*). Formerly, if a rule to plead had not been entered the same term the declaration was amended, a new rule to plead must have been given before judgment could be signed (*y*), but this is now otherwise. (*Ante, 196*). And such new rule is not necessary where a Judge's order has been obtained to plead. (*Ante, 196*). And where, after a rule to plead is entered, the proceedings are stayed by injunction, the plaintiff may sign judgment immediately

(*m*) *Lockhart v. MacKreth*, 5 T. R. 661; *post*, 207.

(*n*) *Jennings v. Webb*, 1 Id. 278.

(*o*) *Rowell v. Cox*, 2 B. & Ald. 392, 1 Chit. Rep. 211, S. C.; *post*, 206, 207.

(*p*) *R. E. 18 Car. 2*; and see *Leigh v. Montero*, 6 T. R. 496; *Samuels v. Dunne*, 3 Taunt. 386.

(*q*) *Bond v. Smart*, 1 Chit. Rep. 735; *Tidd*, 9th ed. 566, 476; *ante*, 198.

(*r*) *Venn v. Culvert*, 4 T. R. 578.

(*s*) *Palmer v. Dixon*, 5 D. & R. 623; and see *R. H. 2 W. 4, r. 46*; *ante*, 204.

(*t*) *Margarem v. Makilaine*, 2 N. R. 509.

(*u*) *Gill v. B. R.* 318; *Tidd*, 422; 1 Sellon, 301.

(*x*) *Fryer v. Smith*, 2 Dowl. P. C. 114; *Mould v. Murphy*, Id. 64, 1 C. & M. 495, S. C.

(*y*) *Barry v. Rodney*, 2 Chit. Rep. 332.

after the injunction is dissolved, without giving a new rule to plead (z). So, if a defendant, plead a plea which is a nullity, before any rule to plead has been given, the plaintiff may, after the time for pleading has expired, sign judgment as for want of a plea, without giving a rule to plead (a).

The judgment cannot be signed on a *dies non juridicus* (b).

*How signed.*] When the time within which the defendant should have pleaded has expired (*ante*; 194), and no plea has been delivered, search for a plea in the books in the office of the clerk of the papers; search also among the pleas you will find there unentered; and if you do not find a plea, then search the general issue book in the office in the clerk of the judgments. If no entry of a plea be found at either office, you may sign judgment. (*As to the mode of signing the judgment, see Vol. 2, Book 2, Part 4, Ch. 3*). In actions commenced by the process prescribed by the 2 W. 4, c. 39, the judgment is intituled as of the day on which it is signed, and also as of the term in which it is signed, or if signed in vacation (c) as of the preceding term.

*Setting aside judgment.*] If the judgment has been regularly signed, it will in general be set aside on an application to the Court or a Judge, with an affidavit that the defendant has, or is advised and believes he has, a good defence to the action on the merits (*see ante*), and on the terms of his paying the costs of the judgment, &c., and pleading issuably instant, taking short notice of trial, and giving judgment of the term when necessary, so as to place the plaintiff in the same situation as if the defendant had pleaded properly in due time (d).

If the judgment has been signed irregularly, the motion to set it aside ought to be made with all the expedition possible, and at all events as soon as notice of inquiry has been given, and not after inquiry (e). The motion should be made in term, or notice of it given in vacation for the next term; or it would be better, perhaps, to take out a summons before a Judge at least two days before the day for executing the inquiry (f).

## 6. The Plea (g), how filed or delivered, &c.

Bail being put in and (except in the case of a plea in abatement) justified, or a common appearance entered, either by the defendant or

(z) *Theodam v. Jackson*, Barnes, 238.  
(a) *Brandon v. Payne*, 1 T. R. 689;  
*Lockhart v. Mackreth*, 5 T. R. 663; 6 East, 549; *ante*, 196.

(b) *Harrison v. Smith*, 9 B. & C. 243;  
*sed vide Bennett v. Potter*, 2 C. & J. 622.

(c) That is—between the last day of the term and the first full day in the next term, exclusive of those days. In actions not commenced by the process prescribed by the 2 W. 4, c. 39, where common bail was filed, or a common appearance entered at any time between the essoin day and the first day of full term, the judgment (at least in proceedings by bill), was signed as of the

day before the essoin day. *Wansley v. More*, 5 T. R. 65.

(d) *Price v. Simpson*, 1 Taunt. 343; *Matthews v. Stone*, Barnes, 242; *Henderson v. Sansum*, 1 Chit. Rep. 226; *Page v. Vogel*, Id. 232; and see further, *post*, Vol. 2, Book 2, Part 4, Chap. 3.

(e) *Fraas v. Paravicini*, 4 Taunt. 545; *Minster v. Coles*, 2 Chit. Rep. 237; *Hill v. Parker*, Id. 165.

(f) *Tidd*, 9th ed. 513; *Gaire v. Goodman*, 2 Smith Rep. 391. See further, *post*, Vol. 2, Book 2, Part 4, Chap. 3.

(g) As to pleas in abatement, see *post*, Vol. 2, Book 2, Part 1.

by the plaintiff for him, (see *ante*, 204, 205), the defendant's attorney or agent may deliver or file his plea. Before he pleads, however, he must take the declaration (if filed) out of the office; otherwise the plaintiff may treat his plea as a nullity, and sign judgment. (*Vide ante*, 192).

*General issue.*] If you plead the general issue alone, either enter it in the general issue book, at the office of the clerk of the judgments, and pay 6d.; or (which is most usual) engross it on plain paper, and deliver it to the plaintiff's attorney or agent (h). It must not be delivered after ten at night (i). It need not be signed by counsel.

*General issue and notice of set-off, &c.*] If you plead the general issue, with notice of set-off, (as you may do when the general issue is alone pleaded), engross both on plain paper and deliver them to the plaintiff's attorney or agent. If the amount of the set-off be less than the sum due to the plaintiff, you must pay the remainder into Court; for the mode of doing which, see *Vol. 2, Book 4, Part 1, Ch. 9, p. 739*. After having obtained from the clerk of the rules the rule for the payment of the money into Court as there directed, annex a copy of such rule to the plea and notice, and deliver them to the plaintiff's attorney or agent. The person who delivers the plea and notice should previously make a copy of them, that he may be enabled to prove the delivery of the notice at the trial (j).

If you intend giving a notice to dispute the act of bankruptcy, &c. in actions by assignees, see how to do it, *post*, *Vol. 2, Book 3, Part 2, Chap. 9*.

*Other general pleas.*] No plea or pleading concluding to the country need be signed by counsel: (*R. H. 2 W. 4, r. 107*) (k). There are also certain other general pleas, which need not when pleaded in this Court be signed by counsel: such as *liberum tenementum*; *comperuit ad diem* to debt on bail bond (l); *nul tiel record* to debt on judgment or recognizance; *son assault demesne*; (*R. T. 12 W. 3, a*); *solvit ad diem* (m); *plene administravit*; *ne unques executor* or *administrator*; *per minus*; *riens per descent*; *infra etatem* (n).

Engross these pleas on plain paper, and deliver them to the plaintiff's attorney or agent by or before ten (k) at night. If entered in the general issue book (m), or filed with the clerk of the papers (q), the plaintiff may consider them as a nullity, and sign judgment. But if

(h) See the forms, *Chit. Forms*, 111.

(i) *R. M. 41 G. 3*; *1 East*, 132. It should seem that the rule of *H. 2 W. 4, r. 50*, as requiring notices, &c., to be served before nine at night, is not applicable to pleadings.

(j) See a form of the notice of set-off, *Chit. Forms*, 113.

(k) Before this rule, it was not necessary that pleas in covenant concluding to the country, special *non est factum*, not guilty to a new assignment,

should be signed by counsel; *R. T. 12 W. 3, (a)*; nor needed a general plea of bankruptcy. *Leigh v. Montagu*, 6 T. R. 496; *Henderson v. Sansom*, 2 B. & Ald. 392, 1 Chit. Rep. 211, S. C.

(l) *Robinson v. Cor*, 2 B. & Ald. 392, 1 Chit. Rep. 211, S. C.

(m) *Lockhart v. Mackreth*, 5 T. R. 661. (n) *Imp. B. R. 287*.

(q) *Rowell v. Cor*, 2 B. & Ald. 392, 1 Chit. Rep. 211, S. C.; *Henderson v. Sansom*, 2 B. & Ald. 392, 1 Chit. 211, n., S. C.

the plaintiff reply specially to any of these pleas, the replication must be filed with the clerk of the papers, and the paper-book will afterwards be made up by him, upon his being furnished with copies of the declaration and plea. All pleas and demurrers upon writs of error, *scire facias* and *audita querela*, must be delivered. (*R. T. 12 W. 3*).

As to demurrers, see *post*, Vol. 2, Book 2, Part 2.

*Special pleas.*] If you plead specially, (except any of the above pleas), and the plea concludes with a verification, it must be signed by counsel (*r*); otherwise the plaintiff may sign judgment (*s*). *Engross it on plain paper, and file it with the clerk of the papers (t), who will make a copy of it for the plaintiff's attorney, if required.* A practice prevails of putting the plea through the door of the office of the clerk of the papers, before it is opened in the morning, or after it closes at night. This, however, should be avoided; or, if adopted, care should be taken to ascertain, as soon as the office is opened, that the plea has been received; for if in such a case the plaintiff's attorney, upon searching for a plea, were by mistake or oversight not to find one, and should sign judgment, the Court would not, perhaps, set that judgment aside upon an affidavit, stating merely that the plea had been put through the door of the office (*u*).

*Double pleas.*] Formerly, when the defendant pleaded two or more pleas to the same part of the declaration, it was necessary previously to obtain leave of the Court to do so. (*4 A. c. 16, s. 4*). But now, by the rule of *T. T. 1 W. 4, r. 13*, no rule to shew cause, or motion, is required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but such rule is to be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances (*v*). And no summons or order is necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas shall be pleaded together; but in all such cases a rule is to be drawn up by the clerk of the rules, upon the production of the engrossment of the pleas, or a draft or copy thereof (*w*).

The Judge, in conformity with the former practice of the Court, will never refuse an order to plead several matters, unless the pleas be inconsistent and liable to make an incongruity on the record; such, for instance, as the general issue to the whole of the declaration, and

(*r*) See *De Normanville v. Meyer*, 1 Chit. Rep. 211.

(*v*) *Samuels v. Dunne*, 3 Taunt. 386.

(*c*) *R. T. 2 J. 1; T. 16 C. 2; M. 2 W. & M.; Jennings v. Webb*, 1 T. R. 278; and see *Thompson v. Tiller*, 2 Str. 1266.

(*u*) See forms of pleas of judgment recovered, Chit. Forms, 113, 114.

(*v*) See the form of the summons and order, Chit. Forms, 111.

(*w*) *Id.* 110.

a tender as to part (*x*), tender as to part and alien enemy as to the residue (*y*), or the general issue and pleas of stock-jobbing (*z*), or the like (*a*). In penal actions, the defendant cannot plead double (*b*).

If a double plea be **filed**, or pleaded before a rule to plead several matters be first drawn up, or at least instructions for it left with the clerk of the rules, it may be treated as a nullity, and the plaintiff may sign judgment. (*R. H. 2 W. 4, r. 34*) (*c*). Or if the pleas pleaded be inconsistent with each other, the plaintiff may move to discharge the rule (*d*); or even if they be consistent, yet the Court or a Judge may, in their discretion, discharge the rule (*e*); but they will not do so unless under special circumstances, for the plaintiff might, in the first instance, have shewn cause against the Judge's order.

*Engross your double pleas on plain paper, and if any of the pleas require counsel's signature, get the whole signed by counsel. If the defendant wish to plead a double plea, not within the description of those specified in the proviso contained in the above rule of T. T. 1 W. 4, take out a summons (f), before a Judge, for leave to plead the several pleas, and accompany it with a short abstract or statement of the intended pleas, and deliver a copy on the plaintiff's attorney before nine at night. On the Judge's order (g) being made, take it with the abstract or statement of the intended pleas to the clerk of the rules, who will draw up the rule accordingly. As soon as you have obtained the rule, annex a copy of it to the plea, and file them with the clerk of the papers. If the rule should not happen to be ready, when you are obliged to file your plea, you may serve a notice on the plaintiff's attorney, stating that instructions have been given for the rule, and that a copy of it shall be delivered as soon as it shall be drawn up (h). If the intended pleas be of the description of those named in the proviso of the above rule of T. T. 1 W. 4, then no summons or order will be requisite, and the clerk of the rules will draw up the rule upon your producing the engrossment of the pleas, or a draft or copy thereof. After obtaining such rule, proceed as in the other cases just pointed out. The pleas must be filed with the clerk of the papers, in all cases, even although they consist of pleas, which, if pleaded separately, must have been delivered, &c. (i). But this must be understood of pleas which are pleaded to the same part of the declaration; for if several pleas be pleaded to distinct parts of a declaration, they must be delivered, if separately they must have been delivered, or they must be filed, if separately either of them must have been filed; therefore, where there*

(*x*) *Jenkins v. Edwards*, 5 T. R. 97; *Macdellan v. Howard*, 4 T. R. 194.

(*y*) *Shombeck v. De la Cour*, 10 East, 326.

(*z*) *Shaw v. Everett*, 1 B. & P. 222; *Rossett v. King*, 1 M. & P. 145.

(*a*) See *Truckenbrodt v. Payne*, 12 East, 206; *Aliven v. Furnival*, 1 Dowl. P. C. 690.

(*b*) 4 A. c. 16, s. 7; *Heyrick v. Foster*, 4 T. R. 701.

(*c*) 1 Sellon, 296; *Tidd*, 605.

(*d*) *Macdellan v. Howard*, 4 T. R. 194.

(*e*) *Rama Chitty v. Hume*, 13 East, 255; *Hammond v. Teague*, 6 Bingh. 197; *Whale v. Lenny*, 2 M. & P. 19, 5 Bingh. 12, S. C.; and see *Strutt v. Craig*, Chit. Sup. 134; *Thomas v. Vanderwoolen*, 2 B. & Ald. 197; *Hones v. Punter*, Id. 777, 1 Chit. Rep. 564, S. C.; *Tidd*, 9th ed. 656.

(*f*) See the form, Chit. Forms, 111. (*g*) Id. 112.

(*h*) *Tidd*, 557; *Maynard v. Bright*, 3 B. & B. 256, 7 Moore, 68, S. C.

(*i*) *Harrison v. Franco*, 2 East, 225.



was a general demurrer to part of a declaration, and the general issue to the residue, it was holden that they should be delivered, not filed (k).

Care should be taken that the rule to plead several pleas be not drawn up before the defendant has appeared (l).

*Withdrawing pleas.*] If the defendant have pleaded or demurred, he cannot afterwards withdraw his plea or demurrer and plead another plea without the leave of the Court or a Judge. (*R. II. 2 W. 4; R. T. 5 & 6 G. 2*); and if he do, plaintiff may, it seems, sign judgment (m). The Court, however, will in general give leave to do so, upon the terms of the defendant's taking short notice of trial, and that the plaintiff, if he have a verdict, shall have judgment of the term (n), or the like, when necessary (o). So, they have given leave to withdraw the general issue, in order that the defendant might pay money into Court and then replead it (p), or replead it with a notice of set-off (q), or, in an action by the assignees of a bankrupt, replead it with a notice of disputing the commission, &c. (*Post, Vol. 2, Book 3, Part 2, Chap. 9*). The Court also, it seems, will allow a defendant to withdraw a special plea, even although a sham plea, and plead again specially, upon terms of pleading issuably, taking short notice of trial, and giving the plaintiff judgment of the term if he should have a verdict (r). But where a defendant, having first pleaded a plea in abatement, afterwards, without the leave of the Court, pleaded a sham plea of judgment recovered, the Court, upon application, allowed the plaintiff to sign judgment as for want of a plea (s).

Formerly, if the defendant had pleaded a special plea or special demurrer, he might, when the paper-book was delivered to him, (unless he had been ruled to abide by his plea or demurrer, or was under terms of pleading issuably), strike out such special plea or demurrer, and return it with the general issue or a general demurrer, without the leave of the Court (t); or if the plaintiff had neglected to enter the issue the same term it was joined, the defendant, it seems, might, within the first five days of the ensuing term, have waived or altered his plea or demurrer. (*R. T. 5 & 6 G. 2, b*). But now, by the rule of *II. T. 2 W. 4, r. 46*, the defendant cannot waive his plea or demurrer without leave of the Court or a Judge; and, it seems, such

(k) *Dymock v. Stevens*, 3 D. & R. 248.

(l) See *Benn v. Geary*, Barnes, 331.

(m) *Palmer v. Dixon*, 5 D. & R. 623.

(n) *Taylor v. Joddrell*, 1 Wils. 254; *Wilkes v. Wood*, 2 Id. 204.

(o) See *Jeffereys v. Walter*, 1 Wils. 177; *Meard v. Phillips*, 2 Str. 906; *Herbert v. Griffiths*, Id. 1181; *Harrison v. Morris*, Barnes, 346, 344.

(p) *Tarleton v. Wragg*, 2 Str. 1271; *Devaynes v. Boys*, 7 Taunt. 33, 2 Marsh. 356, S. C.

(q) *Blackbourn v. Phillips*, 2 Str. 1267. See Com. Dig. Pleadar, E. 13.

(r) *Free v. Hawkins*, 7 Taunt. 278, 1 Moore, 28, S. C. See *Law v. Law*, 2 Str. 900; *Martindale v. Galloway*,

Barnes, 330. In *Cox v. Rolt*, 2 Wils. 253, the Court refused to allow the defendant to withdraw the general issue, and plead it again with the statute of limitations; but that case is overruled; see *Rucker v. Hannay*, 3 T. R. 124; *Maddocks v. Holme*, 1 B. & P. 228. And in a recent case, *Gaselee, J.*, at chambers, allowed the defendant to withdraw a general demurrer framed for delay, and plead the general issue, although the defence intended to be set up under it was garnishing. MS.

(s) *Palmer v. Dixon*, 5 D. & R. 623.

(t) *Law v. Law*, 2 Str. 960; *R. T. 5 & 6 G. 2*; 2 Salk. 514; *Watts v. West*, 3 Salk. 211, 1 Ld. Raym. 674, S. C.

leave would not be granted unless the application be made in a reasonable time, and be supported by merits (*u*).

If the defendant be allowed to withdraw his plea and be ordered to plead *forthwith*, he must plead within twenty-four hours; when ordered to plead *instantly*, he must plead on the same day, or plaintiff may sign judgment.

*Adding pleas.*] Under particular circumstances, leave has been given to add a plea (*w*), even after the lapse of two terms since the defendant first pleaded (*x*); but this must be understood of a plea which goes to the merits.

*Rule to abide by plea.*] We have just seen (*ante*, 210), that by the rule of *H. T. 2 W. 4, r. 46*, the defendant is not at liberty to waive his plea without the leave of the Court, or a Judge. Since this rule, therefore, the former practice of obtaining a rule or order for defendant to abide by his plea no longer prevails, and such rule or order is not now requisite in any case (*y*).

### SECT. 3.

#### The Replication, &c. (*z*).

*Replication.*] There is no time limited for replying, rejoining, &c.; but the parties may do so at any time they think proper, unless they have been ruled to reply, rejoin, &c.

In order to rule the plaintiff to reply, *get a rule from the master on the back of the plea* (*a*); and take it to the clerk of the rules, who will enter it, and will mark on the back of the plea "entered;" pay him 6d. Then serve a copy of it on the plaintiff's attorney or agent, on plain paper (*a*). This rule to reply, &c. may be given at any time when the master's office is open; (*R. H. 2 W. 4, r. 53*), though, formerly, it could only have been given in term or within sixteen days after it (*b*). If the defendant obtain an order for time to plead and file his plea before the time so given him, he cannot, it seems, rule the plaintiff to reply before that time, unless he have previously given the plaintiff a notice of the plea being filed (*c*).

If the rule to reply, rejoin, &c. be not given until after four terms from the time of the last pleading, the party intending to rule the other to reply, rejoin, &c. must give the other a term's notice of his

(*u*) *Freeman v. Jones*, 2 Wils. 391; *Ellis v. —*, *Id.* 369.

(*w*) *Dryden v. Langley*, Barnes, 22.

(*x*) *Waters v. Bovell*, 1 Wils. 223. See *Bludwick v. Osborne*, Barnes, 19.

(*y*) See the former practice, in Tidd, 9th ed. 674; 1 Arch. Prac. 142.

(*z*) As to demurrers, see Book 2, Part 2; as to discontinuing, see post, Vol. 2, Book 4, Part 1, Chap. 19; as to enter-

ing a *nolle prosequi*, see post, Vol. 2, Book 4, Part 1, Chap. 25.

(*a*) See the form, Chit. Forms, 115.

(*b*) The rule of *H. T. 2 W. 4, r. 53*, expressly mentions only the rule to reply; but it should seem that the rule to rejoin, &c., falls within the meaning of it.

(*c*) *Gandy v. Borrowdale*, 1 N. R. 273; *Roberts v. Monkhouse*, 8 East, 547.

intention to do so; unless the cause have, in the mean time, been stayed by injunction or privilege. (*R. T. 5 & 6 G. 2*) (*d*). Such notice must be given before the first day of the term after which you intend to proceed (*e*); and then, the day after the end of the term, get the rule to reply, &c. from the Master, enter it with the clerk of the rules, and serve a copy of it as before directed. Formerly, if the cause had stood over several terms, there must have been a rule to reply given in or of the term in which it was intended to sign judgment of *nonpros*, &c. although there had been a rule of a prior term, but such new rule is not, it seems, in such a case any longer requisite (*g*).

The rule to reply, rejoin, &c. expires in four days exclusive after service; and Sunday, or any holiday on which the Court does not sit, or the office is not open, is reckoned, unless it be the last of the four. (*R. T. 1 G. 2*; *R. II. 2 W. 4*, r. VIII. *ante*, 58). If the party be not ready to reply, &c. within this time, he may obtain a further time by summons, in the same manner as before directed as to pleading. (*See ante*, 199).

It is to be observed, that no replication or rejoinder, or other pleading after declaration, can be filed or delivered between the 10th of August and the 24th of October; (*3 W. 4*, c. 39, s. 11); and in case the time for pleading a replication or other pleading after declaration does not expire before the 10th of August, the plaintiff has the same number of days for that purpose after the 24th of October, as if the replevin, &c. had been delivered or filed on the 24th of October; but in such case it will not be necessary for defendant to give a fresh rule to reply, &c. (*R. M. 3 W. 4*, r. 12).

No demand of a replication or other subsequent pleading, further than the rule to reply, &c. is in any case necessary. (*R. II. 2 W. 4*, r. 54).

If your replication conclude with a verification, *engross it on plain paper, get it signed by counsel, and file it with the clerk of the papers* (*h*). If the replication do not conclude with a verification, it need not be signed by counsel; (*R. H. 2 W. 4*, r. 107). If the plea has been filed, the plaintiff's attorney then adds the *similiter* (*i*), or replication and *similiter*, to the copy of the pleadings, which he gives to the clerk of the papers, for the purpose of making up the paper book; or if the plea has been delivered, then he adds the *similiter* in making up the issue, and delivers the issue or paper-book, when made up, to the defendant's attorney. (*See the next section*). If the plaintiff, however, have been ruled to reply, he must actually file or deliver his replication, according as the plea was filed or delivered, even although his replication conclude to the country, or be merely the *similiter*; otherwise the defendant may sign judgment of *nonpros* (*j*).

(*d*) See the form of notice, Chit. Forms, 116.

(*e*) *Bogg v. Rose*, 2 Str. 1164.

(*f*) *Brook v. Lawrence*, 2 Chit. Rep. 203.

(*g*) See *Pryer v. Smith*, 2 Dowl. P.C. 114; *Mould v. Murphy*, 1d. 54, 1 C. & M.

495, S. C.

(*h*) See form of replication to plea of judgment recovered, Chit. Forms, 116.

(*i*) See the form of *similiter*, Chit. Forms, 116.

(*j*) *Hollis v. Buckingham*, 3 D. & R. 1.

In all cases where the plaintiff's pleading concludes to the country, the plaintiff may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue be afterwards joined, such notice will be available: but if issue be not joined on such replication or other subsequent pleading, and the plaintiff sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as above mentioned; (*R. H. 2 W. 4, r. 59*); and see further as to the notice of trial, *post*, 223, 224.

After replication filed, the Court have, in some cases, under special circumstances, allowed the plaintiff to withdraw it, and reply *de novo* (k).

*New assignment.*] If the plaintiff new assign, instead of replying, the new assignment must be filed with the clerk of the papers; after which, the defendant may be ruled to plead to it, in the same manner as upon the original declaration (l).

*Rejoinder.*] If the replication conclude with a verification, the plaintiff may rule the defendant to rejoin. *This rule is obtained from the master, on the back of the replication, and is entered, served, &c. in the same manner as the rule to reply.* (*Vide ante*, 211, 212) (m).

A rule to rejoin, however, is not necessary where the defendant is under terms to rejoin gratis (n). Also, where the replication concludes to the country, a rule to rejoin is not necessary; (*R. H. 2 W. 4, r. 108*); but the plaintiff, in making up the issue, adds the *similiter*, before he delivers it to the defendant's attorney or agent. (*See the next section*). Indeed, in all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin, &c. (*R. H. 2 W. 4, r. 108*).

A demand, however, of a rejoinder, or other pleading on the part of the defendant, is, in general, requisite before judgment can be signed against him, unless he was under terms to rejoin, &c. without such a demand, or unless the defendant has been ruled to rejoin (o). It should seem, that being under terms to rejoin *gratis* dispenses with this demand. (*Ante*, 201). Such demand when given expires in twenty four hours, and the practice relative to a demand of plea seems in every respect here applicable (p).

*Surrejoinder, &c.*] The plaintiff may be ruled to surrejoinder, the de-

(k) See *Alder v. Chip*, 2 Bur. 755; *Hutchinson v. Brice*, 5 Id. 2692.

(l) Tidd, 9th ed. 693. See form of memorandum for rule to plead to new assignment, and of the rule, Chit. Forms, 115.

(m) See the form, Chit. Forms, 115.

(n) *Ante*, 201; and see *Wye v. Fisher*, 3 B. & P. 443.

(o) Tidd, 9th ed. 478; *R. H. 2 W. 4, r. 108*; *Wye v. Fisher*, 3 B. & P. 443; see *quære* the latter position.

(p) Chit. Sum. Prac. 144; *ante*, 197.

fendant to rebut, &c. in the same manner as they were ruled to reply and rejoin; the rules in all these cases being obtained, entered, served, &c. in the same manner (q).

And here it may be necessary to remark, that you cannot compel a party to take more than one step in the same term; thus, for instance, if the plaintiff reply, the defendant cannot compel him to surrejoinder during the same term, nor, of course, sign judgment of *nonpros* for his not doing so (r).

*Judgment for want of.*] If the plaintiff do not reply, surrejoinder, surrebut, &c. within the time limited for that purpose after service of the rule, or specified in the order for further time, the defendant may sign judgment of *nonpros*. It may be observed, however, that if the defendant's plea or rejoinder be a *nullity*, the defendant cannot regularly sign such judgment (s). *As to the mode of signing judgment of nonpros, see Vol. 2, Book 4, Part 1, Chap. 18.*

So, if the defendant do not rejoin, rebut, &c. it is deemed an abandonment of the plea, and the plaintiff may strike out all the previous pleadings, and sign judgment as for want of a plea (t).

#### SECT. 4.

#### *The Issue, &c.*

1. *Form of the Issue or Paper Book, 214 to 219.*
2. *When and by whom made up, &c., 219 to 221.*
3. *When and by whom entered, &c., 221.*

##### 1. *Form of the Issue or Paper Book.*

The next step requisite in the cause is to make up the issue. This is usually termed the "*issue*," where the general issue has been pleaded, or where the pleadings have been delivered and not filed; or the "*paper-book*," where the pleadings have been filed with the clerk of the papers, and issue joined upon some pleading concluding to the country, or upon *nul tiel record*; or the "*demurrer book*," where either party has demurred.

The issue is engrossed on plain paper (u).

*How intitled.*] Before the recent alterations effected in the practice by the 2 W. 4, c. 39, in actions by *original*, it was more correct to intitle the issue of the same term as the declaration (v); although it might be (and usually was, when made up by the attorney) intitled of the term in which issue was joined, in the same manner as

(q) See the form, Chit. Forms, 115, 28.

(r) *Isaacs v. Goodman*, 1 C. & M. 494; (which was decided since the 2 W. 4, c. 39); & *Holland v. Brown*, MS. H. 1821.

(s) *Garratt v. Hooper*, 1 Dowl. P. C.

(t) *Petrie v. Fitzroy*, 5 T. R. 152.

(u) See the forms, Chit. Forms, 117.

(v) See *Lee v. Clarke*, 2 East, 333, 1 Marsh. 320, 5 Taunt. 754, S. C.

in actions by bill. Also, in actions by *bill*, the issue must always have been intitled of the term in which issue was joined. And it must have been entered as of the term when the rule to reply (if any) was given, and not as of the preceding term, when the plea was pleaded, and if the plaintiff so entered it after being ruled to enter the issue, defendant would have been entitled to sign judgment of *nonpros* (w). Now, however, in actions commenced by the process prescribed by the 2 W. 4, c. 39, it seems that the issue should be intitled of the day of making it up, and, if made up in term, as of that term, or, if made up in vacation, as of the term next preceding the vacation in which it is so made up (x).

*Commencement.*] Before the 2 W. 4, c. 39, in actions by original, the issue, after stating the term, commenced at once with an entry of the declaration (y). In actions by bill, the issue commenced with a memorandum, prefatory to the declaration and proceedings. But now, in actions commenced by the process prescribed (z) by that act, it should seem that the issue, after stating the day and time of making it up as above mentioned, should proceed at once with an entry of the declaration, thus: "*Middlesex to wit: A. B., by P. A. his attorney, complains of C. D., who has been summoned, &c.*" precisely as in the declaration, to the end (a).

(w) *Wood v. Miller*, 3 East, 204.

(x) See the form, Chit. Forms, 117.

(y) The commencement was thus:—"Middlesex, to wit: J. S. was attached to answer J. N." &c., precisely as in the declaration.

(z) The commencement was thus:—"Middlesex, to wit: Be it remembered, that on the [25th] day of [May], in this same term, [or whatever term the declaration was intitled, as 'in Michaelmas term last past,' or, if the declaration were intitled more than four terms before issue joined, then 'in Trinity Term in the first year of the reign of our lord the now King.' The day here mentioned should have been the first day of the term of which the declaration was intitled, if intitled generally of the term; but if the declaration were intitled specially, the day here stated should have corresponded with it; in which latter case the memorandum was termed a special memorandum] before the lord the King at Westminster, comes J. N. by A. B. his attorney, and brings into the Court of our said lord the King, before the King himself now here, his certain bill against J. S., being in the custody of the marshal of the Marshalsea of our said lord the King, before the King himself, of a plea of ['trespass on the case,' according to the form of the action], and there are pledges for the prosecution thereof; to wit, John Doe and Richard Roe; which said bill follows in these words, that is to say: Middlesex to wit: J. N. complains of J. S.," &c., [setting forth the declaration verbatim, omitting the pledges]. See Arch. Forms, 83, 84. A special memorandum was necessary, where the cause of action had arisen after the first day of the term, of which the declaration was intitled. (See *Best v. Wilding*, 7 T. R. 4; *Swancott v. Westgarth*, 4 East, 75). But if a general memorandum by mistake were inserted instead of a special one, the plaintiff was allowed to prove that the action was not actually commenced until after the cause of action accrued; (*Morris v. Pugh*, 3 Bur. 1241, 1 W. Bl. 312, S. C.; *Ruston v. Ouston*, 10 Moore, 194, 2 Bing. 409, 1 M. & C. 202, S. C.; *Leater v. Jenkins*, 8 B. & Cres. 339, 2 M. & R. 429, S. C.); or he might have leave to amend the issue upon payment of costs. (*Dickinson v. Platsted*, 7 T. R. 474, Tidd, 9th ed. 426; *Boys v. Edmunds*, 2 Chit. Rep. 22). And where a bill against an attorney was filed as of Michaelmas term, and appeared by the memorandum to have been filed on the 28th November, the Court held that evidence was admissible on the part of the plaintiff, to shew that it was actually filed on the 24th of December. (*Wilton v. Girdlestone*, 5 B. & Ald. 847.)

(a) See the form, Chit. Forms, 117.

*Entry of the pleadings.*] The declaration and pleadings must be correctly copied in the issue (b), each forming a separate paragraph; and under the special pleas, &c. the clerk of the papers must write the names of the counsel by whom they are signed. (*R. E.* 18 C. 2).

Before the 2 W. 4, c. 39, in actions by *bill*, when the plea was of a term subsequent to that in which the issue stated the bill to have been exhibited, it was necessary in the issue to continue the plea to the bill by an imparlance, general, special, or general special, as might be required; otherwise it would have been a discontinuance (c). But there was no need of continuing the bill down, from term to term, to the plea (d); for the course of this Court was at once to enter an imparlance to the first day of the term in which issue was joined, being the term of which the issue was intitled, without any regard to the times at which the plea and subsequent pleadings had been delivered. There was no need, however, of a continuance at all, if the issue were joined in the same term the bill was alleged to have been exhibited. Nor was it necessary to enter an imparlance on the replication, rejoinder, surrejoinder, or the like, though, in fact, delivered of a subsequent term; for they were presumed to be of the same term with the preceding pleadings (e). However, when the clerk of the papers made up the paper-book, he usually entered continuances between all pleadings, which were not of the same term.

In actions by *original*, it was unnecessary to enter any continuances on the plea, &c. in making up the issue; for the declaration and all the subsequent pleadings were supposed to be of the same term (f). The clerk of the papers, however, usually entered them in making up the paper-book. And the former practice still obtains when the action is commenced, or is supposed to have been commenced by *original*, which now, in personal actions, can be no longer the case, since the 2 W. 4, c. 39. (*Ante*, 3).

Now, however, in actions commenced by the process prescribed by the 2 W. 4, c. 39, there is no occasion for, and consequently it would be improper to enter, any imparlance or continuance in the issue.

*Conclusion.*] After the pleadings are all copied in their order, the issue concludes with an award of the *venire facias*, as a continuation of the last paragraph (g).

In some cases, however, it is necessary to enter suggestions, previously to the award of the *venire*. (*See, as to this subject, more particularly, Vol. 2, Book 4, Part 1, Ch. 31*). As, when the sheriff is interested in the event of the cause, or related by blood or affinity to either of the parties, a suggestion to this effect may be entered on the issue, and the *venire* is then awarded to the other sheriff, if there be two (h);

(b) See *Aaron v. Chaundry*, 4 D. & R. 41, 2 B. & C. 562, S. C.

(c) See the forms of entering imparlances, Arch. Forms, 91, 298; and see, as to this imparlance generally, *post*, Vol. 2, Book 3, Chap. 2.

(d) *Curlawis v. Dudley*, 2 L. Raym.

872, 1 Salk. 179, S. C.; Hardw. 322.

(e) 5 Co. 75.

(f) 2 Saund. 1 c.

(g) See *post*, sect. 8; and see the various forms, Chit. Forms, 118, &c.

(h) *Rex v. Warrington*, 1 Salk. 152; see *Letsom v. Bickley*, 5 M. & S. 144.

or if there be but one, then to the coroner (*i*); or if the coroner be also interested, &c. then to two persons appointed by the Court, called elisors (*j*).

So, in local actions, to avoid delay or expense, the Court or a Judge of either of the Courts may, on the application of either party, order the issue to be tried in any other county than that in which the venue is laid; and for that purpose the Court or Judge may order a suggestion to be entered on the record, that the trial may be more conveniently had in the county or place where the same is ordered to take place. (3 & 4 W. 4, c. 42, s. 22) (*k*).

So, in local actions, where a fair and impartial trial cannot be had in the county where the venue is laid, the Court, upon a proper case to that effect being stated to them by affidavit, will upon motion grant leave to enter such a suggestion upon the issue, with a *nient dedire*, and an award of the *venire* to the sheriff of the next adjoining county (*l*); and it seems to be immaterial whether the next adjoining county be a county palatine, or not (*m*). The affidavits, upon which such an application is founded, should specify the facts from which it is to be inferred that a fair trial is not to be had in the county where the venue is laid (*n*).

So, in actions transitory or local, depending in any of the Courts at Westminster, where the venue is laid in the county of any city or town corporate in England, (with the exception of London, Westminster, Bristol, Chester, and the borough of Southwark), the Court, upon the application of either party, may, if they think proper, award the *venire*, &c. to the sheriff of the county next adjoining to the county of such city or town corporate, in order that the action may be there tried; (38 G. 3, c. 52, ss. 1 & 10) (*o*); and this, it seems, even although the venue have been changed to the city upon the usual affidavit (*p*).

So, where the venue is laid in a place where the king's writ of *venire* does not run, then upon a suggestion that the issue ought to be tried in the next adjoining English county, the *venire* is awarded to the sheriff of such county accordingly: thus, where the venue is laid in Berwick-upon-Tweed, the *venire*, upon suggestion, may be awarded to the county of Northumberland (*q*), and the like (*r*).

And in all cases, where either party would suggest any special matter, as to the awarding of the *venire* out of the common course, a copy should be given to the opposite party, and he should be allowed a reasonable time to consider it, before a *nient dedire* is entered (*s*).

(i) Fortesc. de laud. LL. c. 25; Co. Lit. 158.

(j) Id.; *Holland v. Heron*, Barnes, 465; *Mayor of Norwich v. Gill*, 8 Bing. 27. See forms of these suggestions, Chit. Forms, 728.

(k) See the forms, Chit. Forms, 729.

(l) *Rex v. Harris*, 3 Burr. 1333; *Rex v. Amery*, 1 T. R. 365; *Rex v. Hunt*, 3 B. & Ald. 444.

(m) *R. v. Inh. of St. Mary*, 7 T. R. 735.

(n) *Rex v. Harris*, 3 Bur. 1333. See form of suggestion, Chit. Forms, 729,

and see *Rex v. Hunt*, 3 B. & Ald. 444.

(o) *R. v. Inh. of St. Mary*, 7 T. R. 735.

(p) *Bird v. Morse*, 7 Taunt. 305. See form of suggestion, Chit. Forms, 729.

(q) *Mayor, &c., of Berwick, v. Ewart*, 2 W. Bl. 1036.

(r) *Goodright v. Williams*, 2 M. & Sel. 270; and see *Ambrose v. Rees*, 11 East, 370; *Rex v. Cowle*, 2 Bur. 855; *Way v. Yally*, 2 Salk. 651; and see form of suggestion, Chit. Forms, 123.

(s) *Brocas v. London, City of*, 1 Str. 235.



Lastly, where one of several plaintiffs or defendants, in a personal action, dies *before* issue joined, a suggestion of his death should be entered in whatever part of the issue it becomes necessary, according to the truth of the fact; as before declaration, between declaration and plea, between plea and replication, &c. But if it happen *after* issue joined, it seems that it need not be suggested until you are making up the judgment roll (x).

As to the suggestion of breaches, in debt on bond, within *stat. 8 & 9 W. 3, c. 11, s. 8*, when the defendant pleads *non est factum, &c.*, see *2nd Vol. p. 526*, and see the form, *Chit. Forms*, 122, 123.

*In entering a suggestion on the issue, begin it in a new paragraph; then add, in the same paragraph, the part of the issue immediately following, such as the award of the venire, the plea, or replication, &c.*

When the venue is laid in a county palatine, instead of an award of the venire, you insert a special award of a *mittimus* to the justices there, commanding them to issue the jury process, and, when the cause is tried, to send back the record to this Court (y).

*Rule to return the paper-book.*] When the clerk of the papers makes up the paper-book, he gives, in the margin of it, a rule for judgment, unless the defendant receive the paper-book and return it on a day therein mentioned, in order to be enrolled (z). The day mentioned in the rule is regulated thus:—

If the issue is to be tried at the assizes, the defendant must return the paper book, within four days exclusive after the delivery of it, whether it have been delivered in term or vacation; otherwise the plaintiff may sign judgment. (*R. T. 1 G. 2, o*).

But where the issue is to be tried in London or Middlesex—if the paper-book be made up and delivered in term time, or within four days exclusive after it, it must be returned within four days exclusive after the delivery of it, otherwise judgment may be signed; or, if a plea be not put in in time, so that the paper-book may be made up and delivered within the time above mentioned, then if the paper book be made up and delivered within eight days exclusive after the term, the defendant must return it within four days exclusive after delivery, otherwise judgment may be signed. But if a plea be pleaded time enough to allow of the paper-book being made up and delivered within the four days after term, and the paper-book be not delivered until after that time, in such a case the defendant is not bound to return it until within the first four days of the next term. (*R. T. 1 G. 2, a*). The rule to return the book cannot be drawn up for a shorter time than four days, and this, although the defendant is under terms to take short notice of trial (a). If the book be not returned in the evening of the fourth day, the plaintiff may refuse

(x) See *Far v. Denn*, 1 Bur. 363. See forms of such suggestion, *Chit. Forms*, 731, 732. Where, indeed, one of several plaintiffs died after issue joined and before trial, it was held that a trial without a suggestion of the death on the record was extra-judicial; *Rex v. Cohen*, 1 Stark. 511; *sed vide Chit. Col. Stat. 2,*

*n. (e)*; *Newnham v. Law*, 5 T. R. 577; *Far v. Denn*, 1 Bur. 363; from which it should seem that the death, in such case, might be suggested at any time before judgment.

(y) See the forms, *Chit. Forms*, 124.

(z) See the form, *Chit. Forms*, 125.

(a) *Hale v. Smallwood*, Tidd, 725.

*Proceedings in Parliament.*] Entries in the journals of the House of Lords and House of Commons, are proved by examined copies from their minute-books (*y*).

*Proceedings in Courts of equity.*] The bill and answer must be proved by the production of them, or by examined copies (*z*), which copies you may obtain from the six clerks' office, upon application for that purpose. In order to prove the answer, you are obliged to produce the bill or give in evidence an examined copy of the bill as well as of the answer; but where it was proved by the proper officer that he had searched diligently in the office for the bill, and could not find it, the Court allowed the answer to be read without it (*a*). But if the answer be adduced in evidence merely as an admission of the party on oath, it may be sufficiently proved by an examined copy, without proof of a decree or of the party's handwriting (*b*). The entire answer must be copied, however irrelevant some parts of it may be, for if you give any part of an answer in evidence, the opposite party has a right to have the entire of it read (*c*). If the copy of the answer be given in evidence against the party who was defendant in the suit in equity, the Court will also in general require some evidence of identity (*d*). Proof of the party's handwriting to it will suffice to prove it (*e*). So, if the name and description of the party at law agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity (*f*).

Depositions in equity, when evidence in this Court, must be proved here by examined copies also (*g*). In order to render them evidence, however, you must first give in evidence an examined copy of the bill and answer, and then prove that the deponent is dead, or out of the jurisdiction of the Court, or that he has been diligently sought for and could not be found, or that he has been subpœna'd but fell sick by the way, or the like (*h*). But the bill and answer need not be proved, if the depositions be offered in evidence, as an admission merely, or for the purpose of contradicting a witness (*i*).

A decree in equity, if it remain in paper, may be proved by an examined copy, together with an examined copy of the bill and answer; but if it have been enrolled, it must be proved by an exemplification under the great seal, which requires only to be produced in evidence, without further proof (*j*).

(*y*) *Jones v. Randall*, Cowp. 17; *Rez v. Gordon*, Doug. 594; Arch. Pl. & Ev. 365.

(*z*) Arch. Pl. & Ev. 365, Rosc. 57.

(*a*) 2 Bac. Abr. Evidence (F); Arch. Pl. & Ev. 365.

(*b*) *Lady Dartmouth v. Roberts*, 16 East, 334; *Ewer v. Ambrose*, 4 B. & Cres. 25, 6 D. & R. 127, S. C.; *Highfield v. Peake*, 1 M. & M. 109.

(*c*) 2 Bac. Abr. Ev. (F); Arch. Pl. & Ev. 366.

(*d*) *Hodgkinson v. Willis*, 3 Camp. 401.

(*e*) *Dartnall v. Howard*, R. & M. 169.

(*f*) *Hennell v. Lyon*, 1 B. & Ald. 182.

(*g*) 2 Bac. Abr. Ev. (F).

(*h*) 2 Bac. Abr. Ev. (F); Arch. Pl. & Ev. 366, 367; and see *Cazenove v. Vaughan*, 1 M. & S. 4.

(*i*) 1 Phil. Ev. 375; *Highfield v. Peake*, 1 M. & M. 109.

(*j*) Arch. Pl. & Ev. 367; Rosc. 57.

Where a will remains in Chancery, by order of that Court, it may be proved by an examined copy (*k*).

*Proceedings in Courts of law, not being records.*] If it be intended to give in evidence the examination of a witness on a former trial, you must first give in evidence either the *postea*, or an examined copy of the record; next you must prove the death of the witness, and then give parol evidence of his examination (*l*). Proof of his death, however, is not in all cases necessary; the Court, in one case, allowed such examination to be given in evidence, where the witness did not attend at the second trial, and it appeared probable that he had been kept away by the persuasion and practice of one of the parties (*m*). Perhaps, also, the same grounds for allowing depositions in equity to be given in evidence, (*vide supra*), would be deemed sufficient in this case. Also, if the witness give evidence at the second trial different from what he gave at the first, his former examination may be given in evidence in order to discredit him (*n*).

Rules are proved by office copies (*o*); or the clerk of the rules, upon notice or *subpoena*, will attend at the trial, and prove the rules from the book in which they were originally entered, for which you pay him one guinea (*p*). A rule of Court is not matter of record (*q*).

A Judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court (*r*).

Affidavits, if they have been made use of in Court, and filed with the clerk of the rules, may be proved, it should seem, by office copies; but if filed with any other officer, such as the filacer, the signer of the writs, &c. they must be proved by examined copies, or produced. All other affidavits, not filed, can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn (*s*); or if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their hand-writing (*t*).

*Proceedings before the commissioners of bankrupt.*] Certain proceedings on fiats of bankruptcy, must be entered of record, as directed by stats. 6 *G. 4*, c. 16, s. 95; 1 & 2 *W. 4*, c. 56, s. 13; and 2 & 3 *W. 4*, c. 114; before they can be produced in evidence; all other proceedings in bankruptcy the Lord Chancellor may, upon petition, order to be entered of record. (6 *G. 4*, c. 16, s. 96). And by sect. 97, office copies shall be good evidence of every original instrument or writing

(*k*) 2 *Bac. Abr. Ev.* (F); but see *Comb.* 46.

(*l*) See 2 *Bac. Abr. Ev.* (F); *Arch. Pl. & Ev.* 362; 2 *P. Wms.* 564; 5 *Esp.* 56.

(*m*) *Bull. N. P.* 243.

(*n*) 2 *Bac. Abr. Ev.* (F).

(*o*) *Peake, Ev.* 33; *Selby v. Harris*, 1 *Ld. Raym.* 745; *Duncan v. Scott*, 1

*Camp.* 102.

(*p*) See *Arch. Pl. & Ev.* 367.

(*q*) *Rex v. Bingham*, 3 *Y. & J.* 101.

(*r*) *Arch. Pl. & Ev.* 367; *Israel v. Benjamin*, 3 *Camp.* 40.

(*s*) See 2 *Bac. Abr. Ev.* (F); *Arch. Pl. & Ev.* 368.

(*t*) *Arch. Pl. & Ev.* 368.

it when tendered the next morning, and may sign judgment (b). But if the plaintiff accept the book without objection, he cannot afterwards sign judgment (c).

It may be as well here to notice, that if the *similiter* to the replication has been added by the plaintiff, and the defendant has struck it out and demurred generally, then, the plaintiff having joined in demurrer, and delivered the demurrer-book to the defendant, he must return it within 24 hours (d).

*Notice of trial.*] On the back of the issue or paper-book, write the notice of trial, as directed in the next section (e).

## 2. When and by whom the Issue or Paper Book is to be made up, &c.

*When to be made up.*] When the defendant's pleading concludes to the country, or when he demurs or pleads *nul tiel record*, the plaintiff's attorney may immediately have the issue or paper-book made up, adding the *similiter*, joinder in demurrer, or the common replication to *nul tiel record*. Also, where the plaintiff's pleading concludes to the country, or where he demurs, &c. so that the defendant is not allowed afterwards to allege any new matter, the plaintiff's attorney may have the issue or paper-book made up (adding the *similiter*, &c. for the defendant) without ruling the defendant to rejoin, &c. (*R. T. 1 G. 2, a. R. II. 2 W. 4, r. 59*).

There is no time, however, limited for making up the issue or paper-book. But if either party have demurred, or pleaded a plea, &c. concluding to the country, and the plaintiff will not make up the issue or paper-book, the defendant may make it up, and deliver it to the plaintiff's attorney, in order that he may carry down the record to trial by proviso; or he may rule the plaintiff to reply, and, if he fail to do so, sign judgment of *nonpros*. (*See ante*, 211, 212, 214). Or, if neither party have as yet demurred or pleaded to the country, then the defendant, if he wish to force the plaintiff to proceed, should rule him to reply, surrejoin, &c. as directed *ante*, 211, and sign judgment of *nonpros* if such a rule be not complied with.

In proceedings against prisoners, the plaintiff is bound to proceed to trial within a certain time. (*See post*, Vol. 2, Book 3, Part 2, Chap. 4, Sects. 1, 2).

*By whom.*] The issue or paper-book is usually made up by the plaintiff; but it may be made by the defendant, in order to have a trial by proviso, as above mentioned; and in replevin, prohibition and *quare impedit*, either plaintiff or defendant may make it up, and try the cause without proviso, both parties in these cases being deemed actors.

(b) *Haselar v. Ansell*, Doug. 197; *Thomson v. Ryall*, 4 T. R. 195; *Simmons v. Cope*, 2 Chit. Rep. 242; *Gray v. Pennell*, 1 Dowl. P. C. 120.

(c) Tidd, 9th ed. 726.

(d) Imp. K. B. 348.

(e) *See post*, 223. See the forms, Chit. Forms, 130.

In all cases where the general issue has been pleaded, or where the pleadings must be delivered to the attornies, and not filed, (*see ante*, 206, 207), the issue is made up by the attorney. But in all cases where the pleadings have been filed with the clerk of the papers, he makes up the paper-book or demurrer-book, upon being furnished with a copy of the declaration; *pay him 8d. per folio for the whole book, and 4d. per folio, in addition, for all the pleadings subsequent to the declaration (f)*. Deliver this issue or paper-book to the opposite attorney, having first taken a copy thereof.

*When and how to be delivered, &c.*] The issue or paper-book must be delivered to the defendant's attorney or agent in town (g), at least the number of days previous to the sittings or assizes at which it is intended to try the cause, which it is necessary to give as notice of trial. Formerly, the defendant was obliged to pay the costs of making up the issue, called "issue money," upon the issue or paper-book being delivered to him; otherwise the plaintiff might sign judgment. But now, judgment shall not be signed for non-payment of the issue-money; but the issue-money shall remain to be taxed as part of the costs in the cause; (*R. H. 35 G. 3. 6 T. R. 218*); and this extends, not only to general issues, but also to all special issues, and to the paper-books and demurrer-books made up thereon. (*R. M. 36 G. 3*) (h). Where several defendants appear by several attornies, a copy of the issue or paper-book should be delivered to each of them (i).

If there be any variance between the issue or paper-book, and the declaration, &c. or any other irregularity in making it up, the defendant's attorney should, instead of accepting the issue or returning the paper-book, obtain a Judge's order for setting it right (j); for, by accepting it, &c. he admits that it is properly made up, or, at least, waives any irregularity in it (k).

If, after issue delivered, and notice of trial given, the plaintiff enter a suggestion on the roll, and assign breaches under *stat. 8 & 9 H. 3, c. 11*, he cannot deliver the second issue without a Judge's order first obtained for that purpose (l).

*When to be returned.*] It must be observed that the issue remains with the attorney. But the paper-book must be returned to the attorney who delivered it, within the time limited for that purpose, otherwise the plaintiff may refuse to receive it if afterwards tendered, and may sign judgment as for want of a plea on the following morning (m). If, however, he receive it without objection, he cannot afterwards sign judgment (n).

(f) See *R. T. 12 W. 3, (a)*; *Say. 97*; and see *Thompson v. Tiller*, 2 Str. 1206.

(g) See *Huselfoot v. Duke*, Barnes, 251.

(h) *Fuller v. Osborne*, 6 T. R. 477.

(i) *Tidd*, 9th ed. 725.

(j) *Id.* 727, 609.

(k) *Shepley v. Marsh*, 2 Str. 1131; *Combe v. Pitt*, 3 Bur. 1682; *Mather v. Brinker*, 2 Wils. 243; *Doe v. Cotterell*, 1 Chit. Rep. 277, and note.

(l) *Ethersey v. Jackson*, 8 T. R. 255.

(m) *Thomson v. Ryall*, 4 T. R. 195.

(n) *Tidd*, 9th ed. 726.

If the plaintiff's pleading conclude to the country, and he have added the *similiter* for the defendant, the defendant's attorney may strike out the *similiter* and demur generally; (*see Vol. 2, Book 2, Part 3*); and when he returns the paper-book, he should at the same time serve the plaintiff's attorney with a notice of his having filed a demurrer in the office (*o*). But, under circumstances, the Court or a Judge might prevent this.

Formerly, when the paper-book was delivered to the defendant's attorney, (if he had not been ruled to abide by his plea), he might strike out his special pleadings and return the paper-book with a general issue or a general demurrer; in which case the plaintiff's attorney must have made up the issue again, in the common form, and delivered it to the attorney of the defendant. But this practice cannot now prevail, for, as we have seen *ante*, 209, by the late rule of *H. T. 2 W. 4, r. 46*, the defendant is not at liberty to waive his plea without leave of the Court or a Judge.

### 3. When and by whom the Issue is to be entered.

*When.*] When the issue is accepted, or the paper-book returned, the plaintiff should, in strictness, enter it upon the issue-roll, the same term the issue is, or is supposed to be, joined. Yet in practice this is seldom done until after the trial, and immediately before it becomes necessary to carry in the roll, when the issue is entered on the roll verbatim, together with all the proceedings subsequent to the award of the *venire*, to the judgment inclusive; and the roll is then termed the "judgment roll." (*See post, Chap. 4, Sect. 2*). An *incipitur* (*p*), however, must be entered on the roll, at the time of passing the record of *nisi prius*; otherwise the record cannot be passed or sealed at the *nisi prius* office. (*R. M. 5 A. r. 1*).

The defendant, however, may at any time oblige the plaintiff to enter the issue. But in country causes, the plaintiff cannot, in any case, be obliged to enter the issue the same term it is joined; nor, in actions in London or Middlesex, unless notice of trial have been given. (*R. M. 4 A. c*). In order to oblige the plaintiff to enter the issue, get a rule from the Master on the back of it, giving a certain day to the plaintiff to enter it. Enter this with the clerk of the rules; pay him 3s.; and serve the plaintiff's attorney with a copy of it (*q*). The plaintiff must then enter the issue, and have the roll carried in, in country causes before the continuance-day of term; in actions in London and Middlesex, within four days after notice of the rule; otherwise the defendant will sign judgment of *nonpros*, with costs; (*R. M. 4 A. c*) (*r*); which four days are to be reckoned exclusive of

*Haselar v. Ansell*, 1 Doug. 197; *Simmons v. Cope*, 2 Chit. Rep. 242; *R. T. 1 G. 2, a*.

(*o*) See the form of the notice, Chit. Forms, 125.

(*p*) See a form, Chit. Forms, 128.

(*q*) See the forms, Chit. Forms, 126.

(*r*) See *Michlam v. Bate*, 8 B. & Cres.

642, 3 M. & R. 91, S. C.; in which it was decided that the defendant is not entitled to costs of a judgment of *nonpros*, by reason of the plaintiff's having omitted to enter the issue after issue joined on a demurrer to a plea in *abatement*.

the day on which the copy of the rule is served; and Sunday, or holiday on which the Court do not sit, is reckoned, unless it be the last of the four. (*R. T. 1 G. 2; R. H. 2 W. 4, reg. VIII., ante, 58*) (*s*). But if the roll be brought in at any time before judgment is actually signed, it will be sufficient. If the plaintiff wish a further time, the Court upon application, or a Judge on summons, will grant him a reasonable time for that purpose, if circumstances render it necessary. Also, where the plaintiff's attorney had mislaid the papers, the Court, upon application, ordered the defendant's attorney to give him a copy of the issue, to enable him to enter it (*u*).

The judgment of *nonpross.* for not entering the issue, must be signed as of the term in which the rule was given; otherwise, if the cause stand over to another term without further proceedings, a new rule must be given before the defendant can sign judgment (*w*); and when four terms have elapsed without any proceedings, the defendant cannot rule the plaintiff to enter the issue without giving a term's notice of his intention to proceed (*x*).

This entry of the issue was formerly absolutely requisite before the defendant could proceed to trial by proviso, or obtain judgment as in case of a nonsuit; but now it is no longer so for either of such purposes, (*R. II. 2 W. 4, r. 70*).

*By whom.*] The plaintiff in general enters the issue. But in replevin, prohibition and *quare impedit*, either the defendant or plaintiff may make up and enter the issue, both being deemed actors. Also, if the plaintiff demur to, or take issue on, the defendant's pleading, and will not afterwards make up and enter the issue, the defendant may make it up, and, having obtained a rule to enter the issue from the master (*y*), and entered it with the clerk of the rules, as above directed, he may then deliver the issue or paper-book, together with a copy of the rule, to the plaintiff's attorney; and if, at the expiration of the rule, the plaintiff have not entered the issue, the defendant may do so, and then give notice of trial by proviso, or set down the demurrer for argument. (*R. E. 11 W. 3, a*).

*How.*] In order to enter the issue, get a roll of the term of which the issue is intitled, from the person appointed to deliver out the rolls of the Court (at present Mr. Adams, stationer, of Lincoln's Inn); or it may be had at any other stationer's. Ingross the issue on this roll, beginning about two inches below the stamp, and leaving a margin of an inch at least, and a space at bottom to prevent the writing being rubbed out; writing upon both sides if necessary (*z*).

(s) See *Margerum v. Fenton*, Barnes, 31 l.

(t) *Minns v. Butler*, 1 T. R. 16.

(u) *Dunsley v. Westbroune*, 1 Str. 414.

(v) *Lancaster v. Fraser*, 1 M. & S. 478.

(x) *Lord v. Hilliard*, 9 B. & Cres. 621.

(y) See the form, Chit. Forms, 126.

(z) See R. H. 1657. By R. H. 2 W. 4, warrants of attorney to prosecute or defend must not be entered on distinct rolls, but on the top of the issue roll. See forms of the entry of the issue, Chit. Forms, 126, 127.

Where there are two or more plaintiffs or defendants, and one of them dies after issue joined and before trial," and the cause of action survives to or against the survivor, a suggestion of the death must be entered on the roll, as noticed *ante*, 217, 218, *post*, 871, in pursuance of stat. 8 & 9 W. 3, c. 11, s. 7 (a).

*Roll to be carried in.*] When the issue is thus entered on the roll, get a number for it, from the clerk of the judgments, if the issue be of the same term,—or from the clerk of the treasury, if of any other term; pay him 4s. 8d. Make out your docket paper (b), and take it and your roll to the clerk of the judgments, who will mark the roll and enter the docket: pay him 3s. Then take the roll to the clerk of the treasury, who will file the same in the treasury of the Court.

# SECT. 5.

## Notice of Trial, &c.

*What notice necessary.*] When the trial is to be had in *Middlesex*, and the defendant lives *within* forty miles of London (c), there must be eight days' notice of trial, exclusive of the day on which it is given, and inclusive of that on which the trial is to be had. (*R. M. 4 A. c.*; *R. H. 2 W. 4*, r. VIII., *ante*, 58); or, where there are several defendants, if any one of them reside within forty miles of London, eight days' notice will be sufficient: but if the defendant or all the defendants reside *above* forty miles from London, then *fourteen* days' notice must be given. (*R. M. 4 A. c.* See 14 G. 2, c. 17, s. 4) (d). Even where the defendant resided in India, a verdict for the plaintiff was set aside, because fourteen days' notice was not given (e); and the same where the defendant resided in Ireland (f). The master of a coasting vessel, who had no permanent residence on shore, is deemed to be resident at the port to which his ship belongs, and if that be distant above forty miles from London, he will be entitled to fourteen days' notice (f). If the defendant reside *within* forty miles of London, at the commencement of the action, but afterwards, and before notice of trial given, change his residence permanently to a place beyond that distance, he will be entitled to fourteen days' notice (h), if he have apprized the plaintiff of his removal (i). And if he reside above forty miles from London, he will be entitled to fourteen days' notice, although he may happen to be in London when the notice is served (k).

(a) See the form of this suggestion, Chit. Forms, 732.

(b) See the form, Chit. Forms, 129.

(c) See *Bates v. Pettipher*, 2 Str. 954; *Osgood v. Lum*, Id. 1216. The miles are reckoned as computed miles. *Quære* if the term London must not be understood in its enlarged sense, and to include Westminster, &c.?

(d) *Bawler v. Jenkin*, Barnes, 305. See per *Anshurst, J.*, 4 T. R. 520.

(e) *Douglas v. Ray*, 4 T. R. 552.

(f) *Gorman v. Boyle*, Barnes, 397. See *Blaauw v. Chaters*, 6 Taunt. 458, 2 Marsh. 151, S. C.

(h) *Spencer v. Hall*, 1 East, 688; *Brind v. Turris*, 2 W. Bl. 1205; and see *Raine v. Hodgson*, 2 Price, 279.

(i) *Rochfort v. Robertson*, 12 East, 427.

(k) *Blaauw v. Chaters*, 6 Taunt. 458, 2 Marsh. 151, S. C.



When the trial is to be had in *London*, and notice is given for the sittings in term or for the first day of the sittings after term, it must be an eight or fourteen days' notice, as in *Middlesex*. But if the notice be given for the adjournment day, it will be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant reside above forty miles from *London*; and four days before the said first day, if the defendant reside within that distance. (*R. E. 51 G. 3*) (*l*).

When the trial is to be had at the *assizes*, ten days' notice of trial before the commission day must be given, one day exclusive, and the other inclusive. (*14 G. 2, c. 17, s. 4*; *R. H. 2 W. 4, r. VIII*).

When the trial is to be had before the *sheriff* or the Judge of an inferior court, in pursuance of the order of the Court or a Judge for that purpose, under the recent act, *3 & 4 W. 4, c. 42, s. 17*, it should seem that the same time should be given by the notice as in other cases, viz. an eight or fourteen days' notice, when the trial is to be had in *London* or *Middlesex*, or a ten days' notice when it is to be had in any other county, exclusive of the day on which it is given, and inclusive of that on which the trial is to be had.

If the defendant be under terms to take "short notice" of trial, this means, in country causes, a notice of four days, at least, before the commission day, one day exclusive, the other inclusive (*m*); (*R. H. 2 W. 4, r. 58*; *R. E. 30 G. 3*; *R. H. 2 W. 4, r. VIII. ante, 58*); in town causes two days' notice seems sufficient, although it is usual to give as much more as the time will admit (*n*). If the terms be, to take short notice of trial "for the sittings after term," the defendant is not thereby obliged to take short notice of trial for the *adjourned* sittings after term (*p*). So, if the terms be to take short notice of trial *in term*, the defendant is not thereby bound to take short notice of trial for the sittings *after term*. (*Ante, 201*).

Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, is reckoned as one of the days in these notices, unless it be the last day. (*R. H. 2 W. 4, r. VIII. ante, 58*; see *R. M. 4 A. c.*)

*In what cases.*] Notice of trial must be given in all cases; even where the plaintiff is under a peremptory undertaking to try at the next assizes, or the like (*q*); or where the cause has been made a *remanet* at the assizes (*r*); or where the trial is put off, by rule of Court, from one term to another (*s*); or notwithstanding a special day be fixed for the trial by rule of Court (*t*). But where a cause is made a *remanet* from one sittings to another (*u*), or put off by order of *nisi prius* (*v*), a fresh notice of trial is not necessary. In all cases,

(*l*) *13 East, 392*.

(*m*) See *Lawson v. Robinson*, *1 C. & M. 499*.

(*n*) *Prac. Reg. 300*; *Butler v. Johnson*, *Barnes, 301*; *Tidd, 9th ed. 472, 787*; and see *Price v. Simpson*, *1 Taunt. 343*.

(*p*) *Abbott v. Abbott*, *7 Taunt. 452, 1 Moore, 160, S. C.*

(*q*) *Ifield v. Weeks*, *1 H. Bl. 222*.

(*r*) *Gains v. Biscoe*, *1 M. & P. 37, 4 Bingh. 414, S. C.*

(*s*) *Jacks v. Mayer*, *8 T. R. 245*.

(*t*) *Ellis v. Trusler*, *2 W. Bl. 798*.

(*u*) *Jacks v. Mayer*, *8 T. R. 245*; *Ham v. Greg*, *6 B. & C. 125, 9 D. & R. 125, S. C.*

(*v*) *Shepherd v. Butler*, *1 D. & R. 15*.

however, of peremptory undertakings to try, a fresh notice of trial must be given, although the cause remains in the paper (x). If no notice of trial be given, when necessary, and the plaintiff proceed to trial and have a verdict, the Court will, upon motion, set aside the verdict.

*When to be given.*] The plaintiff is not, it seems, bound by the practice of this Court to give notice of trial, until the term after that in or of which issue is joined (y). But if, after that time, the plaintiff still neglect to give notice of trial, the defendant may proceed to a trial by proviso, (see *Vol. 2, Book 4, Part 1, Chap. 22*), or to obtain judgment as in case of a nonsuit. (*Id. Chap. 24*).

In all cases where the plaintiff, in pleading, concludes to the country, he may give notice of trial at the time of delivering his replication, or other subsequent pleading; and in case issue be afterwards joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice will operate from the time that notice of trial was given as above mentioned. (*R. H. 2 W. 4, r. 59*).

The notice must be given before nine at night. (*R. II. 2 W. 4, r. 50*).

*To whom to be given.*] If the defendant have appeared in person, the notice must of course be given to him; if by attorney, it must be given to such attorney, if his place of residence be known (z); or if not known, then to the defendant (a); and if given to the attorney, he is bound to acquaint his client of it, in due time (b). In country causes, the notice must be given to the agent in town, and not to the attorney in the country. (*R. II. 2 W. 4, r. 57*) (c). But it seems that notice of trial on an old issue may be given either to the attorney in the country or the agent in town (d). If there be several defendants, a notice must be given to each. A personal service is not absolutely requisite.

*Form of it.*] The notice of trial must be in writing. (*R. M. 4 A. c*). It is usually, in ordinary cases, written on the back of the issue; but it may be written on a separate paper, and is so where you give it at the time of delivering the replication or other subsequent pleading, which concludes to the country; and it is also given on a separate paper in all cases of notice of trial by continuance, new notices, &c. (e).

If the notice be given on the issue or paper-book, it need not of course be intitled; nor need it be so particular, as when written on a separate paper. Where the notice indorsed on the issue was, "Take notice of trial at the next assizes," without mention of date, county, or attorney's name, yet the Court held it to be sufficient; although it

(x) *Sulsh v. Cranbrook*, 1 Dowl. P. C. 148.

(y) *Hall v. Buchanan*, 2 T. R. 734; and see *R. H. 20 & 21 C. 2*.

(z) *Les v. Bradford*, Barnes, 300.

(a) *Say. 133*; *Ca. Fr. C. B. 62*.

(b) See *Collins v. Griffin*, Barnes, 37.

(c) See *Tashburn v. Havelock*, Barnes,

306.

(d) *Id.*; *sed quere*.

(e) See forms, *Chlt. Forms*, 180.

would have been clearly bad, if written on a separate paper (*f*). A notice of trial for the sittings after term at the Guildhall, London, must specify whether the trial is to be had at the first day of the sittings, or on the adjournment day (*g*). A notice of trial at "Guildhall, Westminster," at which place the Court of King's Bench do not sit, is, it seems, defective if the defendant will swear positively that he was misled by it (*h*).

If there be two or more defendants, and one of them lets judgment go by default, and the other pleads, the notice of trial should state, that the issue joined with the latter will be tried, and that the jury will at the same time assess the damages against the former (*i*).

We have just seen that in cases where the plaintiff gives notice of trial at the time of delivering his replication, which concludes to the country, or other subsequent pleading so concluding, in case issue be afterwards joined, such notice will be available as a notice of trial. (*R. II. 2 W. 4, r. 59, ante, 225*).

If the notice be irregular or insufficient, and the plaintiff obtain a verdict, the Court upon application will set the verdict aside. The Court, however, are not very strict as to the form of such notices; if they be good in substance, that is, if they be such as to apprise the defendant, with certainty, when and where the plaintiff means to proceed to trial, they will be deemed sufficient. (*See ante, 225*). Or, if insufficient, yet the defendant, by defending the action at the trial, or the like, will thereby waive the irregularity, or even the want of notice, and the Court will not, in such a case, set aside the verdict (*j*).

*Notice of trial by continuance, &c.*] When notice of trial in London or Middlesex has been given, and the plaintiff is not ready to proceed, then, instead of countermanding his notice, he may continue it to the next sitting (not to the adjourned sittings), by giving a notice of trial by continuance (*k*). It must be served two clear business days prior to the sittings at which the cause was to have been tried, the one day inclusive, the other exclusive, as Monday for Wednesday, and the like (*l*); and it can be given only once in a term (*m*). A Sunday cannot be reckoned as one of the two days (*n*).

A notice by continuance being nothing else in effect than a short notice of trial, it is never adopted where there is time to countermand a former notice and give a new one, and consequently never used in country causes. It cannot be given after the plaintiff has countermanded his notice of trial (*o*). Also, if the original notice were void, the notice by continuance will be void also; yet in such a case, if such a time intervene between the service of the notice by continuance and the sittings to which the original notice is thereby continued, as would be sufficient to give as notice of trial, the Court will deem such notice an original or new notice of trial, and valid (*p*).

(*f*) *Henbury v. Rose*, 2 Str. 1287. See also *Tyte v. Steventon*, 2 W. Bl. 1298.

(*g*) Chit. Sum. Prac. 158.

(*h*) *Cross v. Long*, 1 Dowl. P. C. 342.

(*i*) See the form, Chit. Forms, 130.

(*j*) *Doe d. Antrobus v. Jepson*, 3 B. & Adol. 402; *Fraas v. Paravacini*, 4 Taunt. 545; *Gillingham v. Waskett*, M. & Cl. Rep.

(*k*) See the form, Chit. Forms, 131.

(*l*) *Price v. Bambridge*, Barnes, 297.

(*m*) *Green v. Giffard*, 2 Str. 1119.

(*n*) *Grosjean v. Manning*, 2 C. & J. 635; *Wardle v. Ackland*, 2 Dowl. P. C. 28.

(*o*) *Smith v. Hoff*, Barnes, 301.

(*p*) *Boyes v. Twist*, Barnes, 292; *Tyte v. Steventon*, 2 W. Bl. 1298.

Also, if the defendant enter a *ne recipiatur*, so as to hinder the plaintiff from trying his cause at a certain sittings in term, the plaintiff may, during such sittings, give the defendant notice of trial for the next sittings, and proceed to the trial of his cause accordingly (o).

*Term's notice.*] Where no proceedings have been had within four terms exclusive after issue joined, a term's notice must be given of the plaintiff's intention to proceed in the action, before he can give notice of trial. (*R. M. 4 A. c*) (*p*). Formerly, it must have been served before the essoign day of the term (*q*), but now it may be given any day before the first day of term. (*R. II. 2 W. 4, r. 52; and ante, 57*). Giving a notice of trial before the first day of term for the sittings after term, would be insufficient; there should be a notice before the first day of the term of the plaintiff's intention to proceed, and after the end of the term a notice of trial (*r*). A notice that plaintiff will proceed in the cause, though not acted under (*s*), or a notice of trial, though countermanded (*t*), or a Judge's summons, if an order be obtained on it, but not otherwise (*u*), or even signing a *concilium* (*x*), is deemed a proceeding in the cause, so as to render a term's notice unnecessary. So, if the proceedings in the cause were suspended by injunction (*y*), or delayed by consent or at the defendant's request (*z*), the plaintiff may, within a year afterwards, proceed without giving a term's notice. But suing out a *venire facias* in the vacation of the fourth term, tested as of the fourth term, is not a proceeding within the four terms after issue joined; and it was consequently held, in such a case, that a term's notice was necessary (*a*). Nor is the obtaining an order for changing the attorney such a step as will dispense with the term's notice (*b*).

This rule, as to a term's notice, does not extend to a notice of trial by proviso (*c*).

*Notice of countermand.*] The plaintiff has a liberty of countermanding his notice of trial, even in the case of a trial at bar. (*R. M. 4 A.*) (*d*). The notice for this purpose must be in writing. (*Id.*) It may be directed to and served upon the attorney in the country, or the agent in town, at the plaintiff's option, unless otherwise ordered by the Court or a Judge. (*R. II. 2 W. 4, r. 57*) (*e*).

(o) *R. M. 4 A.*; and see *Highmore v. Walker*, 2 Salk. 653.

(p) *Ashwin v. Corbill*, 2 Salk. 650, 457, 645; and see *Lord v. Hilliard*, 9 B. & C. 621; *ante*, 222, as to a term's notice to enter the issue.

(q) *Bogg v. Rose*, 2 Stra. 1164; *Geale v. Chapman*, Barnes, 291.

(r) *Smith v. Colman*, MS. E. 1820.

(s) *Richards v. Harris*, 3 East, 1; *Green v. Gauntlett*, 1 Stra. 531.

(t) *Richards v. Harris*, 3 East, 2, n.; *Hatchell v. Griffiths*, 2 Salk. 645.

(u) 1 Sellon, 408. *Sed vide Deacon v. Fuller*, 1 Dowl. P. C. 675, 1 C. & M. 349, S. C.

(x) *Bland v. Darley*, 3 T. R. 530.

(y) *Hayley v. Riley*, 1 Doug. 71, 72, and n.; *Bosworth v. Phillips*, 2 W. Bl. 784.

(z) *Bland v. Darley*, 3 T. R. 530; *Watkins v. Haydon*, 2 W. Bl. 762; *Hayley v. Riley*, Doug. 71.

(a) *Ashwin v. Corbill*, 2 Salk. 650 See form of term's notice, Chit. Forms, 132.

(b) *Deacon v. Fuller*, 1 Dowl. P. C. 675, 1 C. & M. 349, S. C.

(c) *Theobald v. Crickmore*, 2 B. & Ald. 594, 1 Chit. Rep. 317, S. C.

(d) See form, Chit. Forms, 131.

(e) *Tushburn v. Havelock*, Barnes, 306.

In town causes, where the defendant lives within forty miles of London, two days' notice of countermand is sufficient. (*R. H. 2 W. 4, r. 62; R. M. 4 A. c.*). In country causes, or where the defendant resides more than forty miles from London, notice of countermand must be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given. (*R. H. 2 W. 4, r. 61; and see 14 G. 2, c. 17*). The days, in all these cases, are reckoned, the one inclusive, the other exclusive. (*R. H. 2 W. 4, r. VIII. ante, 58*). The defendant's being under terms to take short notice of trial does not entitle the plaintiff to give less than the usual notice of countermand. (*Ante, 201*).

If the plaintiff do not countermand his notice in time, and do not proceed to trial according to his notice, the defendant shall be entitled to his costs of the day; (*see Vol. 2, Book 4, Part 1, Ch. 24*); and may move for judgment as in case of a nonsuit. (*See Id. Ch. 23*).

*New notice.*] In the case of notice by continuance, or of notice for the next sittings after a *ne recipiatur*, if the plaintiff do not proceed to try the cause at the sittings for which he has so given notice, (*R. M. 4 A. c.*), and in all other cases, if the plaintiff do not proceed to trial at the time for which he originally gave notice, (*R. M. 1654, s. 18*), he must afterwards give a new notice, the same as the original one, before he can carry down the cause for trial; and this even where the trial is put off to the next sittings or assizes, by rule of Court, or although the plaintiff have given a peremptory undertaking to try (*f*). So he must give a fresh notice if the cause has been made a *remanet* at the assizes (*g*). But where a cause is made a *remanet* from one sittings to another (*h*), or is put off by order of *nisi prius* (*i*), no new notice of trial is necessary. The form of a new notice of trial is the same as other notices of trial.

## SECT. 6.

### Evidence.

*Records and Public Documents, and Amendment of Variances at trial, 228 to 232.*

2. *Matters quasi of Record, 232 to 238.*
3. *Written Instruments of a private Nature, 238 to 245.*
4. *Witnesses, Interrogatories, &c. 245 to 254.*

#### 1. Records.

It should first be premised, that, by the late rule of *H. T. 2 W. 4,*

(*f*) *Jacks v. Mayer*, 8 T. R. 245; *Shepherd v. Butler*, 1 D. & R. 15.

(*g*) *Ham v. Greg*, 6 B. & C. 125, 9 D. & R. 126, 5 C. C.; *Gains v. Bilson*, 4 M. & P. 87, 4 Bing. 414, 5 C. C.

(*h*) *Jacks v. Mayer*, 8 T. R. 245; *R. M. 4 A. c.*; *see Gibbins v. Phillips*, 8 B. & C. 437; 4 Bing. 415.

(*i*) *Shepherd v. Butler*, 1 D. & R. 15.

r. vi., the expense of a witness called only to prove the copy of any judgment, writ, or other public document, will not be allowed in costs, unless the party calling him, within a reasonable time before the trial, have required the adverse party by notice in writing and production of such copy to admit such copy, and unless such adverse party has refused or neglected to make such admission (i).

*Public statutes.*] Public acts of parliament are proved (if ever requisite) by the copies printed by the king's printer (j). By stat. 41 G. 3, c. 90, s. 9, the statutes of Ireland, prior to the union, printed and published by the king's printer, shall be received as conclusive evidence in any Court in Great Britain (k).

*Private statutes.*] Copies printed by the king's printer are not evidence of a private act of parliament (l). When therefore it becomes necessary to prove a private statute, *bespeak a copy of it at the Parliament office, in time before the trial; and when ready, call there and examine it with the clerk. Afterwards, upon producing it in evidence, you will be required to swear that you examined the copy, whilst the clerk read the original from the roll, and that it is correct.* A private act containing a clause "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded," renders it unnecessary to prove it by an examined copy (m).

*Records of the king's Courts.*] Records are not complete until delivered into Court on parchment (n). When matter of record forms the gist of the action, and issue is joined upon *nul tiel record*, the record itself must be brought into Court, if it be a record of this Court, in order that it may be inspected; but if it be a record of another Court, the tenor of it is returned into this Court upon *certiorari* (o).

But when matter of record comes in question merely *collaterally*, as where it is stated in the pleadings as inducement, and must be proved, an examined copy of the record will be sufficient evidence (p). For this purpose *bespeak a copy of the record from the clerk of the treasury, and examine it with him in the same manner as is above di-*

(i) See forms of notice, and of admissions, Chit. Forms, 132.

(j) 2 Bac. Abr. Evidence (F); Gilb. Ev. 12.

(k) See Arch. Pl. & Ev. 358; Roscoe, 53.

(l) Bac. Abr. Evidence (F). See Bul. N. P. 225.

(m) Phillips' Evid. 383, 7th ed.; and MSS. M. T. 1833. See *vide* Brett v. Beales, 1 M. & M. 421; Bromhead v.

Beaumont, at Lincoln, 15th July, 1833, S. P. decided by Park, J., after consulting with Taunton, J.

(n) *Re v. Bellamy*, R. & M. 171; B. N. P. 228; *Godfrey v. Jay*, 1 M. & M. 236, 3 C. & P. 192, S. C.

(o) See the proceedings upon *nul tiel record*, post, Vol. 2, Book 2, Part 3; and Arch. Pl. & Ev. 360, &c.; Roscoe, 53.

(p) Peake, Ev. 29; 2 Bac. Abr. Evidence (F).

rected with respect to private statutes. The roll, of course, must have been previously carried in. The judgment-paper signed by the master is not evidence (*q*).

An office copy in the same Court and in the same cause is equivalent to a record, but, in another Court or in another cause, the copy must be proved (*r*). Where a copy is made by a person trusted for that purpose, it is admissible in evidence, without proof of its having been actually examined (*s*).

In order to prove a verdict, you must give in evidence an examined copy of the whole record, including the judgment; for it would not otherwise appear but that judgment had been arrested or a new trial granted. The case of an issue out of Chancery, however, is an exception to this rule, because it is not usual to enter up judgment in such a case; and the decree of the Court of Chancery is equally proof that the verdict was satisfactory and conclusive (*t*). The *postea*, however, when marked, is sufficient evidence that a trial was had between the parties, so as to let in proof of what a witness, since dead, swore at the trial (*u*); or an examined copy of a judgment of nonsuit may be given in evidence for the same purpose (*w*). And, in an action for a moiety of the money paid by the plaintiff under a verdict recovered by A., in a suit against the plaintiff and defendant, the *nisi prius* record and *postea* have been held to be evidence of the verdict and damages in the former suit, without proof of the judgment (*x*).

In order to prove the issuing of a writ, if the writ be the gist of the action, you must get it returned, and then obtain an examined copy of it from the *custos breviarum*. But if it be matter of inducement merely, it need not be returned; and, as it is not a record until returned, it is not necessary in such a case to prove it by an examined copy (*y*); but the writ itself, if in your possession, may be given in evidence (*z*), or if in the possession of the other party, then, upon proving the service of a notice upon him to produce it, and that it has not been returned and filed with the *custos breviarum*, but was in the other party's possession after the day on which it was returnable, you will be allowed to give a copy of it in evidence (*a*). In some cases, to prove a writ of execution, it is necessary also to give in evidence an examined copy of the judgment upon which it is founded (*b*). A copy of the judgment roll, containing an award of an *elegit* and the return

(*q*) *Godefroy v. Jay*, 1 M. & M. 236, 3 C. & P. 192, S. C.

(*r*) Per Lord Mansfield in *Denn v. Fulford*, 2 Bur. 1179.

(*s*) B. N. P. 229.

(*t*) 2 Bac. Abr. Evidence (F); Bull. N. P. 234; Peake, Ev. 50, 51.

(*u*) *Pitton v. Walter*, 1 Str. 162; *Res v. Broune*, 1 M. & M. 315; Peake, Ev. 51.

(*w*) Peake, Ev. 51.

(*x*) *Foster v. Compton*, 2 Stark. 365; and see, as to a set-off, *Garland v. Scoones*, 2 Esp. 648. See Arch. Pl. & Ev. 361, &c.; Rosc. 56.

(*y*) 2 Bac. Abr. Evidence (F).

(*z*) Arch. Pl. & Ev. 363.

(*a*) *Edmonstone v. Plaisted*, 4 Esp. 160.

(*b*) See 2 Bac. Abr. Evidence (F); Arch. Pl. & Ev. 364.

of the inquisition, is evidence of the *elegit* and inquisition in an action for use and occupation (c).

A judgment of the House of Lords is proved by an examined copy of it from the minute-book (d); which may be had upon application at the office of the clerk in parliament.

Convictions before justices of peace are proved by examined copies, which the clerk of the peace of the proper county will make out for you upon application for that purpose, and you may examine them.

The records of indictments are also proved by examined copies, which may be obtained of the clerk of the peace, if the indictments were found at the sessions; or from the clerk of arraigns, if the indictment were found or the trial had at the assizes; or you may serve a *subpoena duces tecum* on the officer in whose custody the indictment is, and he will produce it at the trial. In actions for malicious prosecutions, however, before the record of an indictment for felony can be given in evidence, or before the officer will be authorized in giving you a copy, you must obtain an order for that purpose from the Court at the Old Bailey, if the bill were preferred or the trial had there, or from the Attorney-General, if the bill were preferred or the trial had in any other Court (e). The minute-book of the clerk of the peace is not evidence to prove that an indictment was preferred (f). A minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record (g).

To prove the passing of a fine, the chirograph is conclusive evidence, without further proof (h); but if it be necessary to prove the proclamations, you must obtain an examined copy of the record (i).

A common recovery is proved in the same manner as an ordinary judgment, (*see ante*, 229); but you must also prove the seisin of the tenant to the *præcipe*, unless the recovery be ancient (k).

To prove a deed which has been enrolled, the indorsement of the enrolment upon the deed is evidence sufficient, without further proof of the deed (l). But if the deed be lost, it can be proved only by an examined copy of the enrolment (m). This, however, must be understood of deeds only which need enrolment; for if any other deed be enrolled, (as, for instance, a bargain and sale for years, or the like),

(c) *Ramsbottom v. Buckhurst*, 2 M. & Sel. 565.

(d) *Jones v. Randall*, Cowp. 17; *Rez v. Gordon*, 2 Doug. 593.

(e) *Legutt v. Tollervey*, 14 East, 303. As to the right to a copy, see *Rez v. Just. of Huntingdon*, 5 D. & R. 588; 1 Burn. J. 26th ed. 848.

(f) *Rez v. Smith*, 8 B. & C. 341.

(g) *Rez v. Bellamy*, R. & M. 171.

(h) Plowd. 110 b; 2 Bac. Abr. Evi-

dence (F); Arch. Pl. & Ev. 364.

(i) 2 Bac. Abr. Evidence (F); Arch. Pl. & Ev. 364.

(k) Arch. Pl. & Ev. 364; Rosc. 14.

(l) 2 Bac. Abr. Evidence (F); Peake Ev. 32; *Smartle v. Williams*, 1 Salk. 280.

(m) 2 Bac. Abr. Evidence (F). Peake Ev. 33; *Baikie v. Chandless*, 3 Camp. 20.



and be afterwards offered in evidence, it must be proved in the ordinary way, by the subscribing witness; because the officer had no legal authority to enrol it (*n*).

It is necessary to observe, that in proving an examined copy of a record, it is merely requisite to prove that you examined the copy whilst the officer read the record; it is not necessary that the officer should also read the copy while you examine the record (*o*).

*Letters Patent.*] Letters patent may be given in evidence, without further proof; or they may be proved by exemplification under the great seal (*p*).

*Variances in records, amendment of, at trial.*] By the statute 9 G. 4, c. 15, every Court of record holding plea in civil actions, and any Judge sitting at *nisi prius*, if they think fit, may cause the record, when a *variance* appears between any *matter in writing* or *in print* produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party, as such Judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly. More extensive powers of amendment are also given by the 3 & 4 W. 4, c. 42, s. 23, which allows the record to be amended in variances between the proof and setting forth of any *contract*, custom, *prescription*, name, or other *matter*, not material to the *merits* of the case. These statutes, however, shall be more fully considered hereafter, *post*, 282, 282 a, &c.

## 2. Matters quasi of Record.

It is to be observed that by the rule *H. T. 2 W. 4, r. vi*, the expense of a witness called only to prove the copy of any judgment, writ, or other public documents, will not be allowed in costs, unless the party calling him, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party has refused or neglected to make such admission (*q*).

(*n*) 5 Co. 54; Style, 445; 2 Bac. Abr. Evidence (F); Arch. Pl. & Ev. 364, 365; Rosc. 71, 72.

(*o*) *Reid v. Margison*, 1 Campb. 460, 471, n.; *Rolf v. Dart*, 2 Taunt. 52.

(*p*) Arch. Pl. & Ev. 365; 3 & 4 Ed. 6, c. 4; 13 El. c. 6; see 1 Saund. 189, n.; *Roberts v. Arthur*, 2 Salk. 497.

(*q*) See the forms of notice and of admission, Chit. Forms, 132.

filed in the office or officially in the possession of the Lord Chancellor's secretary of bankrupts (*u*).

*Proceedings in insolvent Court.*] • By 7 G. 4, c. 57, s. 74, office copies of proceedings in the insolvent court are made evidence (*v*).

*Proceedings in the ecclesiastical Courts.*] The libel, answer, and depositions, in the ecclesiastical and admiralty Courts, are proved in the same manner as the bill, answer, and depositions in Courts of equity, by examined copies (*x*).

A copy of the probate of a will, under the seal of the ecclesiastical Court, is sufficient evidence to prove a will of personal property (*y*), or that J. S. is executor, or the like; and the seal of the Court sufficiently authenticates it, without further proof (*z*).

Administration is proved by a certificate from the ecclesiastical Court, that administration was granted; or you may get a clerk from the ecclesiastical Court to attend with the book in which the order for granting administration was entered (*a*); or you may prove it by an examined copy of the registry (*b*).

*Proceedings in the Court of Admiralty.*] The libel, answer, depositions, and sentence in the Admiralty Court, are proved by examined copies (*c*).

*Proceedings in inferior courts, not of record.*] Judgments in a county court, court baron, or other inferior court, may be proved by producing the books in which they are entered, or, it should seem, by examined copies (*d*). It seems, that in proving the judgment of an inferior court, evidence should also be given of the proceedings previous to the judgment (*e*).

If the rolls of a court baron be intended to be given in evidence, you may get the steward or his deputy to produce them at the trial, or they may be proved by an examined copy (*f*); but judgments of a court baron, or other inferior court not of record, can be proved only by the production of the book in which they are entered (*g*). It has been lately held, that a surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made such presentment (*h*).

(*u*) See Arch. Bankrupt Law, 266, 267, 273; and see, as to the evidence generally, in cases of bankruptcy, *Id.*

(*v*) See *Carpenter v. Waite*, 3 Moore, 231; *Neul v. Isaacs*, 4 B. & Cres. 335, 6 D. & Ry. 484, S. C.; *Gould v. Hulme*, 3 C. & P. 625; *Pascall v. Brown*, 3 Stark. N.P.C. 54; *Delafield v. Freeman*, 3 Bingh. 296; *Scott v. Clare*, 3 Camp. 236.

(*w*) Arch. Pl. & Ev. 368.

(*y*) *Rex v. Barnes*, 1 Stark. 243; *Pinney v. Pinney*, 8 B. & C. 335.

(*z*) 1 Ro. Abr. 678; 4 T. R. 258; *Hoe v. Neithrope*, 3 Salk. 154; Bull. N. P. 246;

Arch. Pl. & Ev. 369; Rosc. 59, 60.

(*a*) Bull. N. P. 246, 2 Bac. Abr. Ev. (F); *Elden v. Keddell*, 8 East, 187.

(*b*) *Davis v. Williams*, 13 East, 232. See Arch. Pl. & Ev. 369; Rosc. 60.

(*c*) Arch. Pl. & Ev. 369; Rosc. 103.

(*d*) Arch. Pl. & Ev. 369; Rosc. 59.

(*e*) Com. Dig. Evid. (C. 1); *Fisher v. Lane*, 2 W. Bla. 836, 3 Wils. 297, S. C.

(*f*) *Rex v. Haines*, Comb. 337, 138; *Bray's case*, 12 Mod. 24; 2 Bac. Abr. Ev. (F); See Peake, Ev. 89.

(*g*) Peake, Ev. 76, 80.

(*h*) *Doe v. Calloway*, 6 B. & Cres. 484.

The rolls of a manor are open to the inspection of the lord and the copyholders, but not of strangers; and if inspection be refused, the court, upon application, will rule the steward or person in whose possession the rolls are, to grant it (*i*). The rule will be absolute in the first instance. (*R. II. 2 W. 4, r. 102*). Even a person who has a *prima facie* title to a copyhold, is entitled to inspect the court rolls and take copies of them, so far as relates to the copyhold claimed, although at the time no cause be depending respecting it (*k*). But a freehold tenant of a manor has no right to inspect the court rolls (*l*); at least, not unless some cause be depending relative to the manor, &c. in which his right as tenant may be involved (*m*). But the Court will in no case grant such an inspection to a prosecutor in a criminal proceeding against the lord (*n*).

An award is proved in the same manner as a deed or other written instrument. (*See post*, 138, &c.). You may also prove the submission (*o*).

*Proceedings in foreign Courts.*] The proceedings of Courts of justice in foreign countries are proved by copies under the respective seals of such Courts; but it is necessary also to prove by parol evidence that the seal affixed thereto is the seal of the Court (*p*). If, however, it be proved that the Court has not a seal, then proof by an exemplification under the hand of the Chief Justice of the Court (his hand-writing being proved) will be received (*q*). But records of the Courts in Ireland may be proved by examined copies, in the same manner as the records in this country. It is necessary, however, that the Court should be satisfied that it was with a *record* the copy was examined; and therefore where the witness, produced to prove the copy, stated that he examined it with a parchment roll, shewn to him in a room over the Four Courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the Court, Lord *Ellenborough* refused to receive it in evidence (*r*).

The law of a foreign country, if written, can be proved here only by the production of some authenticated copy (*s*); if unwritten, then by the parol evidence of a witness of competent skill (*t*).

*Books, &c. in the herald's office.*] Where the books or rolls in the herald's office are intended to be given in evidence, upon application to the office for that purpose, and leaving there a notice stating when and where the trial is to be had, and the book or roll required, a clerk will attend and produce it at the trial (*u*).

(i) *Peake*, Ev. 95.

(k) *Rex v. Lucas*, 10 East, 235.

(l) *Smith v. Davies*, 1 Wils. 104.

(m) *Rex v. Shelley*, 3 T. R. 141; *Rex v. Allgood*, 7 T. R. 746.

(n) *Rex v. Cadogan, Earl of*, 5 B. & Ald. 902, 1 D. & R. 559, S. C.

(o) See Arch. Pl. & Ev. 370.

(p) *Henry v. Adey*, 3 East, 221.

(q) *Alves v. Bunbury*, 4 Camp. 28.

(r) *Adamthwaite v. Synge*, Id. 372, 1 Stark. 183, S. C. See Arch. Pl. & Ev. 371.

(s) *Clegg v. Levy*, 3 Camp. 166.

(t) Arch. Pl. & Ev. 372; Rosc. 60.

(u) See 2 Bac. Abr. Ev. (F); 3 Bl. Com. 105.

*Terriers, surveys, &c.*] Old terriers, surveys, and maps of manors, &c. when evidence, must be produced at the trial, and such circumstances connected with them stated in evidence as may induce the Court and jury to give credit to them (*w*).

*Inquisitions and surveys.*] Public surveys and inquisitions, when evidence, should be produced at the trial; or when an inquisition has been returned and filed, an examined copy may be given in evidence (*x*).

Domesday book, as evidence of lands being ancient demesne, must be produced at the trial, by the officer of the Exchequer in whose custody it is, and be inspected by the Judges (*y*). But if the question come incidentally before the Court, an examined copy of that part of the book relating to it will be sufficient (*z*).

A customary of a manor, when evidence, must be produced, and some evidence given to induce the Court to believe that it has been handed down from steward to steward with the rolls (*a*).

*Registers, Certificates, &c.*] An entry in a parish register, of a marriage, christening, or burial, may be proved either by the production of the register itself, or by giving in evidence an examined copy of the entry (*b*). You should also be prepared to prove the identity of the parties married, &c. (*c*). To prove the hand-writing of the parties in the register it is not necessary to call the subscribing witness (*d*).

As to ship's registers, the register of the navy, &c. and as to prison-books, poll-books, entries in a family Bible, family pedigrees, examined copies of tomb-stones, &c., see *Arch. Pl. & Ev.* 374; *Rosc.* 61, 62.

As to certificates of bishops, &c., see *Arch. Pl. & Ev.* 374, 375; *Rosc.* 110, 115. The certificate of a British consul abroad is not admissible in evidence in this country (*e*).

*Corporation books, &c.*] Entries in corporation books, and the books of public companies, relating to things public and general, may be proved by examined copies (*f*); but if they do not relate to corporate acts the original must be produced (*g*), and instruments of a private nature must be produced at the trial (*h*). If the books be ancient, it must be shewn that they come from the proper custody, as from the chest which has always been in the custody of the clerk of the corporation (*i*); it is not sufficient that they are brought from a chest found

(*w*) See 2 Bac. Abr. Ev. (F); *Bridgman v. Jennings*, 1 L. Raym. 734; *Vicor of Kellington v. Master, &c. of Cambridge*, 1 Wils. 170; *Anon.* 1 Str. 35; *Arch. Pl. & Ev.* 375; *Rosc.* 63.

(*x*) See *Arch. Pl. & Ev.* 372; *Rosc.* 56. (*y*) *Anon.* Hob. 188; *Tr. per Pais*, 342.

(*z*) *Arch. Pl. & Ev.* 373.

(*a*) See *Denn d. Goodwin v. Spray*, 1 T. R. 466.

(*b*) 2 Bac. Abr. Ev. (F); *Peake Ev.* 88.

(*c*) See *Birt v. Barlow*, 1 Doug. 157, 174; *Peake, Ev.* 88; *Rosc.* 62.

(*d*) *Per Lord Mansfield*, 1 Doug. 174.

(*e*) *Waldron v. Coombe*, 3 Taunt. 162.

(*f*) *Peake, Ev.* 92, 93; *Re v. Gordon*, 2 Doug. 593, n. 594, n.

(*g*) *Re v. Gwynne*, 1 Stra. 401.

(*h*) *Arch. Pl. & Ev.* 376; *Rosc.* 61.

(*i*) *Mercers of Shrewsbury v. Hart*, 1 C. & P. 114.

in the house of a former clerk after his death (*m*). A party, interested in such entries, has a right to inspect them and have copies of them; and if this be refused, the Court upon motion, grounded upon an affidavit shewing that the evidence likely to be contained in these books is directly material in the cause, or otherwise shewing satisfactorily the interest he has in them, will order that he shall be at liberty to inspect them and have copies (*n*).

*The pope's bulls, &c.*] A bull or licence of the pope, when intended to be given in evidence, must be produced at the trial (*o*); or perhaps an exemplification of a bull under the bishop's seal, would be sufficient (*p*).

*Public acts of state.*] The king's certificate under his sign manual; the gazette, proclamations, and the articles of war, printed by the king's printer; the almanack; a general history, &c.;—are all, when evidence, to be produced at the trial (*q*).

*Variances in matters quasi of record, amendment of, on trial.*] See *ante*, 231.

### 3. *Written Instruments of a private Nature.*

It should be premised that the expense of a witness called to prove the hand-writing to, or the execution of any written instrument *stated upon the pleadings* will not be allowed, unless the adverse party has, upon summons before a Judge a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness), neglected or refused to admit such hand-writing or execution, or unless the Judge, upon attendance before him indorses upon such summons that he does not think it reasonable to require such admission. (*R. II. 2 W. 4, r. 7*) (*r*).

*Deeds.*] When a deed is to be given in evidence, the general rule is that the deed itself must be produced at the trial (*s*). To this, however, there are some exceptions, arising from necessity; as, where a deed has been lost, burnt, or otherwise destroyed, the contents of it may be proved by a copy, or other secondary evidence; or where it is in the hands of the opposite party, and he has been served with a notice to produce it, if, after the proof of the service of that notice, he refuses to produce it, the contents of it may then be proved by secondary evidence; so, if it be in the hands of a third person, who refuses to produce it at the trial, after being served with a *subpoena duces tecum* for that purpose, after proof of that circumstance, of its having

(*m*) *Mercers of Shrewsbury v. Hart*, 1 C. & P. 116.  
 (*n*) 2 Bac. Abr. Ev. (F); Peake, Ev. 94, 95; *May v. Gwynne*, 4 B. & Ald. 301; *Mayor of Lynn v. Denton*, 1 T. R. 680, and *n.*; *Atherfold v. Beard*, 2 Id. 616; *Corporation of Barnstaple v. Lathey*, 3 Id. 303; *Res v. Holland*, 4 Id. 691, 2 East, 70, S. C.; *Mayor of Southampton v. Graves*, 8 Id. 590.  
 (*o*) *Winch*, 70; 2 Bac. Abr. Ev. (F).  
 (*p*) See Peake, Ev. 92.  
 (*q*) See Arch. Pl. & Ev. 376, 377; Rosc. 111.  
 (*r*) See form, Chit. Forms, 133.  
 (*s*) 10 Co. 92 b, 93.

been in his hands on the service of the *subpoena* or afterwards, secondary evidence of its contents will be admitted (*t*). This however, does not, it seems, dispense with the necessity of proving the due execution of the deed itself, either by a subscribing witness, or by some other evidence, care being taken that such evidence be the best which can possibly be procured, under the peculiar circumstances of the case (*u*). Also, if the contents of the deed be proved by a copy, parol evidence of the correctness of the copy must be given by some person who had compared it with the original (*x*). It must also appear that the deed was properly stamped.

Secondly, as to the proof of the execution of the deed; if there have been no subscribing witness to it, then proof of the hand-writing of the parties will be sufficient (*y*); the law in such a case presuming a delivery. But if the deed were attested, the execution must be proved by at least one of the subscribing witnesses (*z*), unless when the fact of execution is one of the admissions in the cause (*a*); for even the acknowledgment of the party, or his admission in an answer to a bill of discovery, are in this case deemed merely secondary evidence, and not sufficient (*b*). Payment of money into Court, however, is considered such an admission of the execution of a deed, as dispenses with the necessity of calling the subscribing witness (*c*). It does not appear necessary that the subscribing witness should swear that the deed was actually *executed* in his presence; if he were afterwards desired to attest it by the party who executed it (*d*), or in the presence of the party (*e*), and he attest it accordingly, this will be sufficient, provided the attestation and execution be done so nearly at the same time as fairly to be deemed parts of the same transaction (*f*). On the other hand, a person who even sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness (*g*). In proving the execution of a deed the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence; but that seeing **his own** signature to it, he has no doubt that he saw it executed, and this has been always received as sufficient proof of the execution (*h*).

To this rule of proving the execution by the evidence of an attesting witness, or otherwise, there are many exceptions. *First*, where money has been paid into Court, as above mentioned, it dispenses with the necessity of proving the deed upon which the action is

(*t*) 2 Bac. Abr. Ev. (F); Arch. Pl. & Ev. 377, 378.

(*u*) See *vide post*, 241.

(*x*) 2 Bac. Abr. Ev. (F); and see Arch. Pl. & Ev. 377, 378.

(*y*) Peake, Ev. 100.

(*z*) *Barnes v. Trompowsky*, 7 T. R. 266; Peake, N. P. C. 31; *Manners v. Postan*, 4 Esp. 240, 3 B. & P. 343, S. C.; Peake, Ev. 100, 103; and see *England v. Roper*, 1 Stark. 304.

(*a*) *Millward v. Temple*, 1 Camp. 375.

(*b*) Arch. Pl. & Ev. 378; *Johnson v.*

*Mason*, 1 Esp. 89; *Call v. Dunning*, 5 Id. 16, 4 East, 53, S. C. See *Bowles v. Laneuorthy*, 5 T. R. 306.

(*c*) *Randall v. Lynch*, 2 Camp. 357, 12 East, 179, S. C.

(*d*) *Grellier v. Neale*, Peake, N. P. C. 146; *Powell v. Blackett*, 1 Esp. 97.

(*e*) *Park v. Mears*, 3 Esp. 171, 2 B. & P. 217, S. C.

(*f*) MS. E. 1814.

(*g*) *M'Craw v. Gentry*, 3 Camp. 232.

(*h*) *Maugham v. Hubbard*, 2 M. & R. 37, 8 B. & C. 16, S. C.

founded; and the same when the execution is one of the admissions in the cause. *Secondly*, where the deed is thirty years old or upwards, the Court will presume that it has been duly executed, and will not require it to be proved (*i*); provided possession have followed the deed, or that some satisfactory account be given of it, and provided there be no rasure or interlineation in it, and that it do not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting (*k*). It may be necessary here to remark that when you give an ancient obligation for the payment of money in evidence, you should be prepared to prove a payment of principal or interest within the last twenty years, or other circumstance sufficient to rebut the presumption the law will otherwise raise of such obligation's having been satisfied (*l*). *Thirdly*, where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the enrolment, as already mentioned, (*ante*, 231). *Fourthly*, where one deed is recited in another, proof of the second deed is deemed proof of the one recited, as between the parties to the second deed, and those claiming under them (*m*). *Fifthly*, if the name of a fictitious person be put as the only subscribing witness, evidence of the handwriting of the party alone will be sufficient (*n*). So, if the subscribing witness be since dead (*o*); or have become insane (*p*), or blind (*q*), or be abroad, out of reach of the process of the court (*r*), whether domiciled there or not (*s*); or if he have set out for the purpose of leaving the kingdom (*t*); or if, from circumstances, it may fairly be presumed that he has left the kingdom (*u*); or if it appear that he is serving in the navy (*x*), or the like; or if, after a *bona fide*, serious, and diligent inquiry, he cannot be found (*y*); or if he be interested in the event of the suit (*z*), or become subsequently

(i) Bull. N. P. 255; *Chelsea Water Works Company v. Cooper*, 1 Esp. 275, 278.

(k) 2 Bac. Abr. Ev. (F); Bull. N. P. 255; *Doe v. Wollcy*, 8 B. & Cres. 22; Arch. Pl. & Ev. 379; Rosc. 70; and see *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

(l) See *Waring v. Griffiths*, 1 Bur. 444, 2 Ld. Ken. 183, S. C.; *Searle v. Barrington*, 2 Str. 826; *Forbes v. Wale*, 1 W. Bl. 532, 1 Esp. 275, S. C.; *Oswald v. Leigh*, 1 T. R. 272.

(m) 2 Bac. Abr. Ev. (F). See *Lampon v. Corke*, 5 B. & Ald. 607, 1 D. & R. 214, S. C.; Arch. Pl. & Ev. 379.

(n) *Fasset v. Brown*, Peake, N. P. C. 23.

(o) Arch. Pl. & Ev. 379; *Nelson v. Whittall*, 1 B. & Ald. 19; and see *Doe v. Jesson*, 6 East, 85.

(p) 12 Viners's Abr. 224; *Currie v.*

*Child*, 3 Camp. 283.

(q) See *Wood v. Drury*, 1 L. Raym. 734.

(r) Peake, N. P. C. 90; *Cooper v. Marsden*, 1 Esp. 2; *Barnes v. Trompowsky*, 7 T. R. 265; 12 Vin. Abr. 224; and see *Hodnett v. Forman*, 1 Stark. 90.

(s) *Prince v. Blackburn*, 2 East, 250.

(t) *Ward v. Wells*, 1 Taunt. 461.

(u) *Wardell v. Fermor*, 2 Camp. 282; *Hay v. Brookman*, 3 C. & P. 555.

(v) *Parker v. Hoskins*, 2 Taunt. 223.

(y) *Coghlan v. Williamson*, 1 Doug. 93; *Cunliffe v. Sefton*, 2 East, 183; *Barnes v. Trompowsky*, 7 T. R. 266;

*Crosby v. Percy*, 1 Camp. 303, 1 Taunt. 364, S. C.; *Wardell v. Fermor*, 2 Camp. 282; *Pytt v. Griffith*, 6 Moore, 538;

*Burt v. Walker*, 4 B. & Ald. 637.

(z) *Buckley v. Smith*, 2 Esp. 697; *Swire v. Bell*, 5 T. R. 371; *Godfrey v.*

*Norris*, 1 Str. 34; Peake, Ev. 100.

incompetent as a witness (a); then, upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed, that is, you may prove the deed by proving the hand-writing of the witness and party (b). But it is not a sufficient ground for admitting evidence of the witness's hand-writing, that he is unable to attend from illness, and lies without hope of recovery (c). But if there be two witnesses to the deed, and any of the circumstances just now mentioned apply only to one of them, the deed must of course be proved by the other (d). Also, by stat. 26 G. 3, c. 56, s. 38, deeds executed in the East Indies, when the subscribing witnesses are resident there, may be given in evidence in Great Britain, upon proof of the hand-writing of the parties and of the witnesses. *Sixthly*, if the deed appear to be attested by one or more persons, but in point of fact these persons never saw the deed executed or delivered, the attestation may be deemed a nullity, and the deed be proved by proving the hand-writing of the party (e). *Seventhly*, where a party producing a deed under a notice to produce claims a beneficial interest under it, it will not be necessary for the party calling for the deed to prove the execution of it (f). But this rule does not apply to a case where the party has had it so long in his possession (as nine months) that he might have been prepared to prove the execution (g). *Eighthly*, where the defendant is in possession of a deed and has had notice to produce it, but does not do so, then on proof of the service of such notice and of defendant's possession of the deed, plaintiff need not prove his execution of it. At all events, where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce, it was held that on the non-production of the deed, the plaintiff might give parol evidence of the contents without calling the subscribing witness who was in Court (h). *Ninthly*, if the deed be lost and it is not proved that plaintiff knew of the names of the subscribing witnesses, he may recover without subpoenaing them (i).

To prove a will of lands, it is only necessary to call one of the witnesses who attested it (j); if the opposite party wish, he may call the other two (k). The witness called, however, should be prepared

(a) *Jones v. Mason*, 2 Str. 833. See *Hovill v. Stephenson*, 5 Bing. 493, 496.

(b) See *Nelson v. Whitthall*, 1 B. & Ald. 19; *Adam v. Kerr*, 1 B. & P. 360.

(c) *Harrison v. Blades*, 3 Camp. 457; *Doe v. Evans*, 3 C. & P. 221.

(d) Arch. Pl. & Ev. 379.

(e) *Fitzgerald v. Elsee*, 2 Camp. 635, 636; *Ley v. Ballard*, 3 Esp. 173, n. Peake, N. P. C. 146; *Talbot v. Hodson*, 7 Taunt. 251, 2 Marsh. 527, S. C.; *Boxer v. Rabith*, Gow, 175; but see *Phipps v. Parker*, 1 Camp. 412; *Goodtitle v. Clayton*, 4 Bur. 3224.

(f) *Pearce v. Hooper*, 3 Taunt. 62; *Or v. Morice*, 3 B. & B. 139, 6 Moore,

347, S. C.; *Burnett v. Lynch*, 5 B. & Cres. 589, 8 D. & R. 368, S. C.; *Doe v. Heming*, 6 B. & Cres. 28, 9 D. & R. 15, S. C.; *Gordon v. Serretan*, 8 East, 548.

(g) *Vacher v. Cocks*, 1 B. & Ald. 147. (h) *Cook v. Tanswell*, 8 Taunt. 450, 2 Moore, 513, S. C.; *Jackson v. Allen*, 3 Stark. 74; *Dixon v. Haigh*, Esp. 409; *sed vide ante*, 239.

(i) *Keeling v. Ball*, Peake, Ev. App. 82; *Gillies v. Smither*, 2 Stark. 528.

(j) *Peake*, Ev. 103; *Doe v. Smith*, 1 Esp. 391; *Skin*, 413; *Holdfast v. Dowling*, 2 Str. 1253, 1 W. Bl. 8, S. C.

(k) Bull. N. P. 264.



to give parol evidence of every circumstance attending the attestation, necessary to shew that the will was duly executed and attested according to the directions of the statute. A will of personal property only, is proved by a copy of the probate, as mentioned *ante*, 235 (*l*).

The *hand-writing* of a witness or party may be proved by some person who has a knowledge of it, from having seen him either write (*m*), or from having been in the habit of corresponding with him (*n*); or the hand-writing of a party may be proved by his own acknowledgment or admission (*o*). But it cannot be proved by comparing it with other writings, although confessedly of his hand-writing (*p*); unless, perhaps, where there is already contradictory evidence of the fact (*q*); or, perhaps, where the writing is so ancient that no witness can be found who can prove it (*r*): and the Court or jury may always make such comparison (*s*). A person who is skilled in the detection of forgeries, may, it seems, prove that the writing is in a feigned hand, though he never saw the party write (*t*); but this has been since questioned, and with good reason (*u*).

Care must be taken that the deed be properly stamped (*x*).

*Writings not under seal.*] Writings not under seal are proved in the same manner as deeds; that is, by the subscribing witness, if there be one (*y*); or if not, then by proof of the party's hand-writing (*z*). A warrant to distrain (*a*), or notice to quit (*b*), if attested, must be proved by the attesting witness. It is said, also, that an ancient writing of this kind shall be received in evidence without proof, in the same manner as an ancient deed (*c*). If lost or destroyed, copies, or other secondary evidence of their contents, will be received; but evidence must be given, at the same time, of the genuineness of the original instrument (*d*).

In an action by a payee against the acceptor of a bill of exchange, or against the maker of a promissory note, you must produce the note or bill, and prove the hand-writing of the defendant (*e*). But, if the action be brought by an indorsee, he must also prove the hand-writing

(*l*) *Gorton v. Dyson*, 1 B. & B. 219, 3 Moore, 55th, S. C.; *Pinney v. Pinney*, 8 B. & C. res. 335; and see further, *Rosc.* 72.

(*m*) *Arch. Pl. & Ev.* 380; *Rosc.* 68; and see *Garrels v. Alexander*, 4 Esp. 37; *Stanger v. Searle*, 1 Id. 14; *Lewis v. Sapin*, 1 M. & M. 39.

(*n*) *Gould v. Jones*, 1 W. Bl. 384; *Harrington v. Fry*, R. & M. 90.

(*o*) *Waldridge v. Kennison*, 1 Esp. 143.

(*p*) *Macfarson v. Thoytes*, Peake, N. P. C. 20; *Greaves v. Hunter*, 2 C. & P. 477; *Stanger v. Searle*, 1 Esp. 14; *Burr v. Harper*, Holt, C. N. P. 420.

(*q*) *Altenbrook v. Roach*, 1 Esp. 351; *Goodtitle v. Braham*, 4 T. R. 497, Peake, Ev. 106 to 108, and App. lxxxv to lxxxv.

(*r*) *Gill. Ev.* 25, 26. See *Brookbark v. Woodley*, Peake, N. P. C. 20, n.; *Taylor v. Cook*, 8 Price, 632.

(*s*) *Griffith v. Williams*, 1 C. & J. 47; *Allport v. Meek*, 4 C. & P. 267.

(*t*) *Rea v. Cator*, 4 Esp. 117; *Stanger v. Searle*, 1 Id. 14; *Goodtitle v. Braham*, 4 T. R. 497. See *Batchelor v. Honeywood*, 2 Esp. 714.

(*u*) *Gurney v. Langlands*, 5 B. & Ald. 330.

(*x*) See *Atch. Pl. & Ev.* 380.

(*y*) *Wetherston v. Edgington*, 2 Camp. 94; *Stone v. Metcalf*, 1 Stark. 53, 4 Camp. 217, S. C.; *Higgs v. Dixon*, 2 Id. 180. See *Barnes v. Trompowsky*, 7 T. R. 206.

(*z*) *Arch. Pl. & Ev.* 381; *Rosc.* 64.

(*a*) *Higgs v. Dixon*, 2 Stark. 180.

(*b*) *Doe v. Durnford*, 2 M. & S. 62.

(*c*) *Tr. per Pals*, 370; *Rosc.* 70; but see *Fortesc.* 43.

(*d*) See 1 Atk. 446. See *Arch. Pl. & Ev.* 382.

(*e*) *Peake, Ev.* 234, 235.

of the first indorser, and of the intermediate indorsers if they be mentioned in the declaration (f).

In an action by indorsee against an indorser of a bill of exchange or promissory note, or drawer of a bill of exchange, you must produce the bill or note, and prove the defendant's hand-writing; you must also prove a presentment for payment or acceptance, and refusal, and that the defendant had due notice thereof. If it be a foreign bill of exchange, the non-payment or non-acceptance is proved by the mere production of the protest, without further proof. The notice must be proved by the person who either left it, or put the letter containing it into the post-office. If you cannot prove the notice in an action against the drawer of a bill, you should be prepared to prove that he had no effects in the hands of the drawee, from the time of the drawing of the bill until the time of the non-payment or non-acceptance (g); or that he subsequently promised to pay the bill, or paid something on account of it.

In an action by drawer against acceptor, produce the bill and prove the acceptance (h).

*Books of accounts, &c.*] When an entry in a book of accounts is evidence, the book must be produced at the trial, and either proved by the clerk who made the entry (i), or (where the effect of the entry is to charge the clerk who made it) (k), by proof of the clerk's death, and then proving his hand-writing (l); but proving that he is abroad is not sufficient (m); and even where his death can be proved, this evidence is admissible only within a year after the making of the entry, if the books be those of a "tradesman or handicraftsman," and produced for the purpose of establishing a debt against one of his customers; (7 J. 1, c. 12); which has been holden to extend to entries in a banker's books (n). But a tradesman's books, or other books of accounts, if produced at a trial, may be good evidence against the owner (o), or between other parties (p), after the year. Entries made by a deceased collector of rates, charging himself with the receipt of money, and made by him in the public books of his office, are admissible against his surety to prove the receipt (q); and so with respect to the entries of a clerk (r). Entries in the land-tax collector's books, stating A.B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time (s).

(f) Peake, Ev. 235.

(g) Id. 235, 236.

(h) Id. 236.

(i) Cooper v. Marsden, 1 Esp. 1.

(k) Calvert v. Archbishop of Canterbury, 2 Id. 646; Barry v. Bebbington, 4 T. R. 514; and see Roe v. Rawlings, 7 East, 279; Higham v. Ridgway, 10 Id. 109; Doe v. Robson, 15 Id. 32.

(l) Pitman v. Maddox, 2 Salk. 690, 1 Ld. Raym. 732, S.C.; Price v. Torrington, 1 Salk. 285, 2 Ld. Raym. 873, S.C.

(m) Cooper v. Marsden, 1 Esp. 1; and see Digby v. Stedman, Id. 328; Bull. N. P. 282.

(n) Sikes v. Marshall, 2 Esp. 705.

(o) Tr. per Pais, 348.

(p) Higham v. Ridgway, 10 East, 109.

(q) Goss v. Watlington, 3 B. & B. 132, 6 Moore, 355, S.C.; Middleton v. Melton, 10 B. & C. 317.

(r) Whitnash v. George, 8 B. & C. 556.

(s) Doe v. Cartwright, R. & M. 62.

*Notice to produce papers, &c.*] If the adverse party be in possession of any written instrument, which would be evidence for you, if produced, you may serve either him or his attorney or agent (*t*), with a notice to produce it at the trial (*u*). The notice must be served a reasonable time before the trial, so as to enable the party served to make an effectual search, and produce the same at the proper time (*x*). A notice to produce a lease served on the wife of the defendant's attorney, at his lodgings on the evening of the day before the trial, is too short (*y*). So, at the assizes, a notice to produce served in the assize town is, in general, too late (*z*). It has been held, that if a party himself be abroad, a notice served on the 13th December, between five and six in the afternoon, upon his attorney, to produce documents at the trial, which is to take place on the 15th December, is sufficient (*a*).

There is no occasion to give a notice to produce a mere notice; for the copy of a notice is itself deemed an original, and may be given in evidence, with proof of service, without notice to produce the counterpart delivered (*b*). So, it seems, secondary evidence may be given of a notice of the dishonour of a bill, without a notice to produce it (*c*). So the demand of the copy of a warrant, in an action against a constable, may be proved by a copy, without giving notice to produce the original (*d*). The copy of an attorney's bill has also been holden to be sufficient evidence, without notice to produce the original delivered (*e*); but the bill in such a case can be proved only by such copy or counterpart, and not from the attorney's books (*f*). Also it has been holden, that in trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied, though no notice was given to produce the certificate itself (*g*). So, in trover for a bond, the plaintiff will be allowed to give parol evidence of it, to support the general description of the instrument in the declaration, without giving notice to produce the original (*h*). Also, if the instrument required be in Court at the time of the trial, although no notice was given to produce it, the Court would, it seems, allow secondary evidence of it, if the party in whose possession it is refuse to have it given in evidence (*i*).

(*t*) See *Cates v. Winter*, 3 T. R. 306.

(*u*) *Peake*, Ev. 109; *Attorney-General v. Le Merchant*, 2 T. R. 201, n. See *Baldney v. Ritchie*, 1 Stark. 338; *Harvey v. Morgan*, 2 Id. 17; *Graham v. Dyster*, Id. 21, 6 M. & S. 1, S. C.; *Sideways v. Dyson*, 2 Stark. 49; and see form of notice, Chit. Forms, 133.

(*x*) Chit. Sum. Prac. 178.

(*y*) *Doe v. Grey*, 1 Stark. 283; *Sims v. Kitchen*, 5 Esp. 46.

(*z*) *Bryan v. Wagstaff*, 2 C. & P. 127, 5 B. & C. 314, S. C.

(*a*) Id. 126.

(*b*) *Colling v. Treweek*, 6 B. & Cres. 398; *Gottlieb v. Danvers*, 2 Esp. 455; *Sur-*

*tees v. Hubbard*, 4 Id. 203.

(*c*) *Ackland v. Pearce*, 2 Camp. 599; *Roberts v. Bradshaw*, 1 Stark. 28; *Kinn v. Beaumont*, 3 B. & B. 288, 7 Moore, 112, S. C.

(*d*) *Jory v. Orchard*, 2 B. & P. 39.

(*e*) *Colling v. Treweek*, 6 B. & Cres. 398; *Anderson v. May*, 2 B. & P. 237, 3 Esp. 167, S. C.

(*f*) *Phillipson v. Chase*, 2 Camp. 110.

(*g*) *Bucher v. Jarratt*, 3 B. & P. 148.

(*h*) *How v. Hall*, 14 East, 274; *Scott v. Jones*, 4 Taunt. 865. See *Cowan v. Abrahams*, 1 Esp. 50; *Colling v. Treweek*, 6 B. & Cres. 398.

(*i*) See *Roe v. Harvey*, 4 Bur. 2484.

The time for producing documents, &c. pursuant to this notice, is not until the opposite party has entered on his case (j).

It is optional with the party, upon whom the notice has been served, to produce the instrument required, or not. If he do not, then, upon proving the service of the notice, you will be permitted to prove the contents of the instrument by a copy or other secondary evidence, in the same manner as if it had been destroyed or lost (k). It has been holden also, that when such secondary evidence is received, it is not necessary to prove the execution of the original; but this may be doubted. (*See ante*, 238, 241). But if the instrument be produced, you must prove it in the regular way (l), and a Judge, upon summons, will probably grant you an order previously, for an inspection, in order that you may be aware of the evidence necessary to prove the execution (m). The only exception to this rule is, the case of ship's articles, when they come out of the hands of the adverse party upon notice, in an action by a seaman for wages; the articles being then evidence of themselves, by stat. 2 G. 2, c. 26; 2 G. 2, c. 36 (n).

There are many cases, also, where the Court, under circumstances, will compel a party, by rule, to produce books, papers, &c. at the trial (o); in an action upon a policy of insurance, a Judge at chambers has made a general order on the assured to produce upon affidavit all papers in his possession relating to the cause (p).

*Variances in stating private instruments, amendment of, at trial.]*  
(*See ante*, 231).

#### 4. Witnesses and Interrogatories, &c.

As to your witnesses: ascertain exactly what each of them can prove, and take a memorandum of their evidence, in order to insert it accurately in your brief (q).

*Process against witnesses.]* If you are not certain that your witnesses will attend at the trial voluntarily, and give evidence, you must subpœna them; for it has been holden, that even a person actually present at the trial, may, in a civil cause, refuse to be sworn as a witness, unless he have been duly subpœna'd (r). In ordinary cases the common subpœna is sufficient process to compel the attend-

(j) *Graham v. Dyster*, 2 Stark. 22, 1 M. & S. 1, S. C.; *Sideways v. Dyson*, 2 Stark. 49.

(k) *See Graham v. Dyster*, 2 Stark. 21, 6 M. & S. 1, S. C.; *Sideways v. Dyson*, 2 Stark. 49; *Grove v. Ware*, Id. 174; *Gorton v. Dyson*, 1 B. & B. 219, 3 Moore, 558, S. C.; *ante*, 238.

(l) *Wetherston v. Edgington*, 2 Camp. 94; *Gordon v. Secretan*, 8 East, 548, 549; *Johnson v. Lewellin*, 6 Esp. 101; but see *Pearce v. Hooper*, 3 Taunt. 60; *Res v. Inhabitants of Middlezoy*, 2 T. R. 41.

(m) *See King v. King*, 4 Taunt. 666.

(n) *See Johnson v. Lewellin*, 6 Esp. 101; *Bowman v. Manztelman*, 2 Camp. 315.

(o) *Roe v. Harvey*, 4 Bur. 2489; *Geery v. Hopkins*, 2 Ld. Raym. 851, 7 Mod. 129, S. C.; *Göhler v. Nunnely*, 2 Str. 1130.

(p) *Goldschmidt v. Marryat*, 1 Camp. 502; and see *Clifford v. Taylor*, 1 Taunt. 167.

(q) *See*, as to the competency of witnesses, Arch. Pl. & Ev. 388, &c.; as to the credit of witnesses, Id. 399, &c.; as to when you will not be allowed the expense of a witness to prove a public record, &c., or a public document, *see ante*, 228; or a private document, *see ante*, 238.

(r) *Bowler v. Johnson*, 1 W. Bl. 37; 2 Bac. Abr. Ev. D.

ance of your witness. Engross it on plain parchment(s); you may include the names of four witnesses in one writ (t). Take it, together with a *præcipe* (u), to the signer of the writs; pay 1s. 8d. signing, 7d. sealing. (See *It. 15 C. 2, r. 1*). Then make out a copy of the *subpœna* (w) for each witness; and serve it upon him personally, at the same time shewing him the writ (x), and paying or tendering to him 1s. in town causes, if he live within the weekly bills of mortality, or his reasonable expenses (*vide post*, 248) if he live at a greater distance, or the action is to be tried at the assizes. The witness should be served a reasonable time before the trial (y); a notice in London, at two o'clock in the afternoon, for a witness to attend the sittings at Westminster on the same afternoon, is too short (z); but if he be in Court at Westminster or London at the time of the trial, and live within the bills of mortality (a), it will be sufficient if you serve the copy of the *subpœna* on him then (b). The service should be personal, and the original *subpœna* must be shewn; for otherwise, if he disobey the *subpœna*, he cannot be proceeded against by attachment (c). If the cause be made a *remanet*, the *subpœna* must be re-sealed, and a copy of the *subpœna* again served (d).

If a person, who is not a party to the cause, have in his possession any written instrument, &c. which could be evidence for you at the trial, instead of the common *subpœna*, you must serve him with a *subpœna duces tecum*, commanding him to bring it with him and produce it at the trial (e). Let it be signed, sealed, and a copy served, in the same manner as the common *subpœna*. Upon being served with a copy of this *subpœna*, he must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful or reasonable excuse for withholding it; of the validity of which excuse the Court, and not the witness, is to judge (f). It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness (g); but if it tend to criminate himself (h), or his client, (if the witness be an attorney) (i), or if it be his title deed (k), the Court will not compel him to produce it. If the witness, instead of bringing the papers, &c. required, deliver them to the opposite party, by whom they are withheld, the Court will allow secondary evidence of the contents of

(a) See the form, Chit. Forms, 134; and see *Holt*, C. N. P. 526.

(t) *Doe v. Andrews*, Cowp. 846.

(u) See the form, Chit. Forms, 134.

(w) The name of a witness, although not in the original *subpœna*, may be inserted therein at any time, if he have been regularly served with a copy. *Holt*, C. N. P. 526, *sed quære*.

(x) *Thorpe v. Gislbourne*, 11 Moore, 55, 3 Bing. 223, S. C.; *Wadsworth v. Marshall*, 1 C. & M. 87.

(y) *Hammond v. Stewart*, 1 Str. 510.

(z) *Id.* 5 Esp. 46; *Tidd*, 806.

(a) See *Bowles v. Johnson*, 1 W. Bl. 36.

(b) *Doe v. Andrews*, Cowp. 845.

(c) *Smalt v. Whitmull*, 2 Str. 1054;

*Wadsworth v. Marshall*, 1 C. & M. 87.

(d) *Anon.* 23rd June, 1792, MS. B.

(e) See the form, Chit. Forms, 135; and of the *præcipe*, *Id.*

(f) *Amey v. Long*, 9 East, 473; and see *Pearson v. Fletcher*, 5 Esp. 90.

(g) *Id.*; *Amey v. Long*, 1 Camp. 14, 180, n., 6 Esp. 116, S. C.; *Corsen v. Dubois*, *Holt*, 239; see *Roberts v. Simpson*, 2 Stark. 203.

(h) See *Harris v. Hill*, 3 Stark. 140, 1 D. & R. N. P. C. 17, S. C.; *Ditcher v. Kenrick*, 1 C. & P. 161; 1 Esp. 105.

(i) *Redd v. Harvey*, 4 Bur. 2489.

(k) *Pickering v. Noyes*, 1 B. & Cres. 263, 2 D. & R. 386, S. C.; *Rex v. Upper Boddington*, 8 D. & R. 726.

them to be given, without a notice to produce the originals (*l*). A witness producing papers under a *subpœna duces tecum* need not be sworn unless he be examined (*m*).

If the witness be in custody at the time of the trial, the only way of bringing him into Court to give evidence is by *habeas corpus ad testificandum*. This writ is obtained upon motion in Court, or application to a Judge at chambers, founded upon an affidavit stating that he is a material witness, and willing to attend (*n*). The Court will thereupon make a rule, or the Judge grant his *fiat* for the writ. *Engross the writ on plain parchment (o); and get a Judge's name indorsed on it (p). It must be directed to the officer in whose custody the witness is. Then take the writ, together with the præcipe (q), to the signer of the writs and get it signed. Get it sealed. Then leave it with the officer to whom it is directed; pay or tender to him his reasonable charges for bringing up the witness, and he will bring him into Court on the day of trial, according to the exigency of the writ.* A prisoner in execution may now be brought up in this manner to give evidence (*r*), although it was formerly holden otherwise (*s*). So, a sailor on board a king's ship may be brought up by this writ, if he have been previously *subpœna'd*, and be willing to attend (*t*). But the Court will not grant this writ, to bring up a prisoner of war; the proper way of proceeding in that case, is by application to the secretary of state (*y*). So, where the application appeared to be a mere contrivance to remove a prisoner in execution, the Court refused to grant it (*z*). Also, by stat. 44 G. 3, c. 102, a Judge of this Court may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in the United Kingdom, for the purpose of giving evidence in any Court of record in England.

*Privilege of witnesses from arrest.*] A person *subpœna'd* as a witness, enjoys a privilege from arrest, whilst attending the Court, not only on the day mentioned in the *subpœna*, but also on every day of the same sittings or assizes, until the cause is tried; he is also privileged in like manner, during a reasonable time before and after the trial, whilst coming to or returning from the place where the sittings or assizes are held. (*See ante*, 114, 115). This privilege has also been holden to extend to witnesses, although not *subpœna'd* (*a*). If a witness, under these circumstances, be arrested, the Court, or the Judge at *Nisi Prius*, will, upon application, order him to be discharged (*b*).

*Penalty for not obeying the subpœna, &c.*] There are three ways of proceeding against a person who refuses or neglects to attend a

(*l*) *Leeds v. Cook*, 4 Esp. 256.  
 (*m*) *Davis v. Dale*, 1 M. & M. 514,  
 Rosc. 64, S. C.  
 (*n*) See the form, Chit. Forms, 136.  
 (*o*) Id.  
 (*p*) *Rex v. Roddam*, Cowp. 672.  
 (*q*) See the form, Chit. Forms, 137.  
 (*r*) *Geery v. Hopkins*, 2 L. Raym. 851,  
 7 Mod. 129, S. C.; *Rex v. Burbage*, 3  
 Bur. 1440.

(*s*) *Burdus v. Shorter*, Barnes, 222,  
 Comb. 17, 48.  
 (*t*) *Rex v. Roddam*, Cowp. 672.  
 (*y*) *Furly v. Nounham*, Doug. 420.  
 (*z*) *Rex v. Burbage*, 3 Bur. 1440.  
 (*a*) See *Meekins v. Smith*, 1 H. Bl.  
 636.  
 (*b*) *Ante*, 115; *Peake*, Ev. 209; and see  
*Ex p. Tillotson*, 1 Stark. 470.

trial, after being regularly served with a *subpoena* for that purpose : by attachment, by action, on the stat. 5 *El. c. 9*, and by action at common law.

The Court will grant an attachment against a witness for not attending at a trial, when duly served with a *subpoena* for that purpose (c), whether the cause were called on or not (d), provided the *subpoena* were served a reasonable time before the trial (e), and that the witness were personally served with it (f) and that his reasonable expenses, when he is entitled to them, were paid or tendered to him at the time of service (g), and that there have been no unreasonable delay in applying for the attachment (h).

Also, by stat. 5 *El. c. 9, s. 12*, if a person, being regularly *subpoena'd* as a witness, and having his expenses tendered to him, and not having any reasonable or lawful impediment, do not appear according to the tenor of the process, he shall forfeit 10*l.* and shall pay such damages to the party grieved as to the Court, out of which the process was awarded, shall seem meet. These damages must be assessed by the Court at Westminster, and not by the jury or Judge at *Nisi Prius*; and an action of debt will lie afterwards on such assessment (i). But no action will at all lie, unless the cause were called on and the jury sworn (k). Or instead of this action on the statute, the party injured may have an action on the case against the witness for his non-attendance (l), or for his not producing papers required of him by a *subpoena duces tecum* (m).

*Witnesses' expenses.*] If the witness live within the bills of mortality, and be required to attend at Westminster or in London, a shilling only is given or tendered to him, at the time he is served with the copy of the *subpoena* (n); but if he live at a greater distance, or if required to attend at the assizes, his reasonable expenses of going and returning, and also during his necessary stay at the place of trial (o), calculated according to his situation in life, and the distance of his residence from the place of trial, (see 5 *El. c. 9*), must be paid or tendered to him; and the master, (who is in general the sole judge of what witnesses should be allowed) (p), in taxing costs, will allow these expenses, even where foreign witnesses are brought from abroad, and return to their own country after the trial (q), or even although

(c) *Hammond v. Stewart*, 1 Str. 105; *Wyat v. Wingford*, 2 Id. 810, 2 L. Rayn. 1528, S. C.; *Doe d. Jupp v. Andrews*, Cowp. 845; *Pearson v. Iles*, 2 Doug. 556. See *Blundford v. De Tastet*, 5 Taunt. 260, 1 Marsh. 42, S. C.; *Holme v. Smith*, 6 Id. 9, 1 Marsh. 410, S. C.  
(d) *Barrow v. Humphreys*, 3 B. & Ald. 598, *semb.*

(e) *Hammond v. Stewart*, 1 Str. 510; *Holme v. Smith*, 6 Taunt. 9, 1 Marsh. 410, S. C. See 1 Blng. 306.

(f) *Snalt v. Whitmill*, 2 Str. 1054; *Wakefield's case*, Hardw. 313.

(g) *Chapman v. Pointon*, 2 Str. 1150; *Fuller v. Prentice*, 1 H. Bl. 48; *Bowles v. Johnson*, 1 W. Bl. 36.

(h) Tidd, 723.

(i) *Pearson v. Iles*, 2 Doug. 556 to 561.

(k) *Bland v. Swafford*, Peake, 60.

(l) *Pearson v. Iles*, 2 Doug. 556.

(m) *Amey v. Long*, 9 East, 473, 1 Camp. 14, 180, a, S. C.

(n) 1 Seldon, 454.

(o) *Fuller v. Prentice*, 1 H. Bl. 49.

(p) *Skelton v. Seward*, 1 Dowl. P. C. 411.

(q) *Thelluson v. Staples*, 2 Doug. 438. See *Hagedorn v. Althutt*, 3 Taunt. 379, *Cotton v. Witt*, 4 Id. 55; *Schimmel v. Lousada*, Id. 695; *Sturdy v. Andrews*, Id. 697; *Tremain v. Barrett*, 6 Taunt. 38, 1 Marsh. 463, S. C.

the witness were also *subpœna'd* and paid by the other party (r). So, where a seafaring man remained in this country, in order to give evidence, it was holden that the Master was justified in allowing a subsistence for him, from the service of the *subpœna* until the trial (s). So, although the evidence of particular witnesses be not in strictness admissible, yet if there were reasonable ground for believing it to be admissible, the master should allow the expenses of such witnesses (t). But the master will not allow for any contingent losses the witness may suffer by obeying the *subpœna* (u); unless the witness be of such a profession, that, from the nature of his avocations, he cannot find a substitute; in which case the master will allow a reasonable compensation for his loss of time (v). Thus he will allow payments for loss of time to physicians and surgeons; but not to any other professional or scientific men (x), or to attorneys (y), merchants (z), brokers (a), or the like; nor will he allow the expenses of scientific experiments, although necessarily made for the purpose of affording evidence in the cause (b), or the expense of sending a person to find the subscribing witness to a deed (c), or the like. He may allow for loss of time to a foreign witness (d). The expenses thus allowable upon taxation must, it seems, be actually paid to the witnesses, before the master will allow them (e).

These expenses must be either paid or tendered to the witness, and the sum tendered must be sufficient, otherwise he is not bound to attend (f); and if the witness be a married woman, the money should be tendered to her, and not to her husband (g). The tender must also be made at the time of serving the *subpœna* (h); for where a witness, who was *subpœna'd*, but to whom his expenses were not tendered, attended at the trial, but refused to be sworn, although his expenses were then tendered to him, the Court refused to grant an attachment against him (i). If a witness attend at the trial, and refuse to give evidence unless his expenses are paid, and he is thereupon not examined, yet he may maintain *assumpsit* for these expenses against the party who *subpœna'd* him (k).

*Examination of witnesses upon interrogatories.*] If a witness be abroad, or be going abroad, or about to die, or be so ill or infirm that

(r) *Benson v. Schneider*, 7 Taunt. 337, 1 Moore, 21, 76, S. C.

(s) *Berry v. Pratt*, 2 D. & R. 424, 1 B. & C. 276, S. C.; and see *Mount v. Lar-kins*, 8 Bing. 195, 1 M. & Scott, 357, 1 Dowl. P. C. 262, S. C.; *Temperley v. Scott*, 8 Bing. 392.

(t) *Rushworth v. Wilson*, 1 B. & C. 267; *Mutchinson v. Allcock*, 1 D. & R. 165; and see *Andrews v. Thornton*, 8 Bing. 431.

(u) *Moor v. Adam*, 5 M. & S. 156; and see *Willis v. Peckham*, 1 B. & B. 515, 4 Moore, 300, S. C.

(v) MS. M. 1814.

(x) *Severn v. Olive*, 3 B. & B. 72, 6 Moore, 235, S. C.

(y) *Collins v. Godefroy*, 1 B. & Adol. 950, 1 Dowl. P. C. 326, S. C.

(z) *Moor v. Adam*, 5 M. & S. 156.

(a) *Lopes v. De Tastet*, 3 B. & B. 292.

(b) *Severn v. Olive*, 3 B. & B. 72.

(c) *Laing v. Bowes*, 3 M. & S. 69.

(d) *Loneragan v. Royal Exchange Assurance Company*, 7 Bing. 725, 729, 1 Dowl. P. C. 223, S. C.

(e) See *Lopes v. De Tastet*, 3 B. & B. 292, 7 Moore, 120, S. C.

(f) *Chapman v. Pointon*, 2 Str. 1150.

(g) *Cro. El.* 122, W. Jon. 430.

(h) *Bowles v. Johnson*, 1 W. Bl. 36.

(i) Id.

(k) *Hallet v. Mears*, 13 East, 15.



it is likely he will not be able to attend at the trial, or the parties consent that the examination or deposition of the witness shall be read in evidence on the trial, you may apply to the Court for a rule, or to a Judge at chambers for a summons, to shew cause why the witness should not be examined upon interrogatories or otherwise, or why a commission should not issue for such examination, and such commission is absolutely requisite, if the witness be out of the jurisdiction of the Court. (1 W. 4, *sess.* 2, c. 22). In a recent case it was doubted whether pregnancy or imminent delivery be a cause for the examination of a witness under this act: and, at all events, if it were such a cause, the affidavits of competent persons should be produced, shewing that the delivery would probably happen about the time fixed for the trial of the cause (*l*). You obtain this rule upon an affidavit stating the witness to be material, that you cannot safely proceed to trial without him, and that he is abroad, or going abroad, or about to die, or that he is so ill or infirm that it is likely he will not be able to attend the trial, or that both parties consent to the intended examination and the examination being read in evidence on the trial. Such an affidavit would not be necessary to obtain an order of a Judge unless he required it. At the time of the application you must be prepared with the name of the person before whom you intend the examination to take place (*m*). If the application be delayed, with a sinister intention to prevent the opposite party cross-examining the witness, as if it be on purpose delayed till a few days before the departure of the witness abroad, the Court will refuse the application (*n*). Serve a copy of the rule or the summons on the opposite attorney (*o*).

Before the above act of the 1 W. 4, *sess.* 2, c. 22, if at the time of shewing cause against the rule, &c. the opposite party did not consent, you could proceed no further; for the Court had no direct means of compelling him. Yet if the plaintiff refused his consent, the Court, upon application, would in general put off the trial from time to time, until the defendant, by a bill in equity or by the return or recovery of his witness, could have the benefit of his evidence (*p*); or if the defendant refused, the Court would not, perhaps, have given him judgment as in case of a nonsuit (*q*). But now, by virtue of that act, the Court or a Judge thereof, when they think fit, have power of ordering such examination of the witness, if within the jurisdiction of the Court, or of ordering a suit in the nature of a *mandamus* or commission for the examination of the witness if he be out of such jurisdiction (*r*).

If the witness be within the jurisdiction of the Court, then you may either apply to the Court, if in term time, or to a Judge at chambers for the desired rule or order. There is no occasion, in this case, to obtain a commission for the examination, as is the case where the

(*l*) *Abraham v. Newton*, 8 Bing. 274, 1 M. & Scott, 384, 1 Dowl. P. C. 266, S. C.

(*m*) *Doe d. Thorn v. Phillips*, 1 Dowl. P. C. 86.

(*n*) See *Pirie v. Iron*, 8 Bing. 143, 1 M. & Scott, 223, 1 Dowl. P. C. 252, S. C.

(*o*) See the form of the affidavit and

rule and order, Chit. Forms, 137, 138, 139.

(*p*) *Furly v. Newnham*, 2 Doug. 419, 420; *Mostyn v. Fabrigas*, Cowp. 174. See *Caltham v. Vaughan*, 1 B. & P. 210.

(*q*) *Tidd*, 727.

(*r*) See sects. 1, 4, 5.

witness is not within the jurisdiction of the Court. If you apply to the Court, then deliver a brief to counsel, accompanied with the affidavit above mentioned: the rule obtained thereby will be only a rule *nisi* in the first instance: serve a copy of it on the opposite attorney. If you apply to a Judge at chambers, then take out a summons and serve it on the opposite attorney and attend the summons as in ordinary cases: the Judge may require an affidavit in support of the application; if he does, frame one as above mentioned or otherwise. If the rule or order be granted, it will be for the examination of the witness on oath upon interrogatories, or sometimes *vivâ voce*, or for a commission to issue for the examination or otherwise, as the Court or Judge think fit, before the Master or a barrister, or some other person named therein. The Court or Judge will, by the rule or order, in general, command the attendance of the witness for the purpose of being examined, and also the production of any writings or other documents which the party obtaining such rule or order may require—the same should be specified in the rule or order, as you would specify them in a *subpœna duces tecum*. If this be omitted in the first order, you may obtain a further rule or order inserting such command. If the witness be ill, or if any other cause make it convenient or necessary so to do, his attendance may be directed to be made at his own place of abode or elsewhere. Upon the rule or order being granted, serve two copies of it, one on the opposite attorney and the other personally on the witness. Get an appointment signed by the person or persons, or one of them, appointed to take the examination, of the time and place of attendance for the witness to be examined, and serve it on the witness on or after the service of the rule or order. Serve a copy or notice of such appointment on the opposite attorney. The witness will be entitled to his expenses and remuneration as in other cases, (*ante*, 248; see 1 W. 4, sess. 2, c. 22, s. 5), and they must be paid or tendered to him on the service of the appointment (*ante*, 249). If the examination is not to be a *vivâ voce* one, then prepare your interrogatories and get them signed by counsel (s): the questions therein must not be leading questions, otherwise, the answers thereto could not, if objected to by the opposite party, be read at the trial; engross them on parchment, and serve a copy of them on the opposite attorney: such service had, perhaps, better be made on the service of the appointment for the witness's attendance. The opposite attorney may also draw up interrogatories by way of cross-examination. If the examination is to be *vivâ voce*, then there is no occasion for any written interrogatories. Take the witness, or he will attend at the time and place appointed, to the Master, or Judge's clerk, or person appointed by the rule or order to examine him.—If he be in custody, a writ of *habeas corpus ad testificandum* may be procured from the Court as in other cases. (*ante*, 247). The Master, or Judge's clerk, or person appointed to take the examination, must examine the

(s) See a form, Chit. Forms, 142.

witness on oath, or on his affirmation if a quaker. He, or the Judge of the Court in which the action is pending, may swear the witness. If the witness swear falsely, he will be guilty of perjury. (1 *W.* 4, *sess.* 2, c. 22, s. 7). His examination should be conducted by the same rules as the examination of a witness on a trial at *Nisi Prius*. He need not produce any document that he would not be compellable to produce at a trial of the cause. (*Id.* s. 5). The Master or person appointed to examine the witness, should certify the examination and depositions under his hand. The Master, or person taking the examination, must make, if need be, a special report to the Court touching the examination, and the conduct or absence of any witness or other person therein or relating thereto; and the Court may act against the witness as in other cases of contempt. (*Id.* s. 8). If the witness wilfully disobey the rule or order, which commands his attendance, &c., and he has been served with an appointment of the time and place for his examination signed by the party to examine him, and his expenses have been tendered him, he will be guilty of a contempt of Court, and he may be proceeded against as usual by an attachment, (*ante*, 248), the Judge's order being made a rule of Court before or at the time of the application for the attachment. (*Id.* 5).

If the witness be *out of the jurisdiction of the Court*, as out of the country, or the like, (and this whether he be within the King's dominions or not) (*t*), instead of the motion or summons above mentioned, you should then, in pursuance of the above statute, apply to the Court, in term-time, or to a Judge at chambers, to grant a rule or order for a writ in the nature of a *mandamus*, or commission to be issued to the Judge or Judges of the Court in whose jurisdiction the witness is, or to commissioners to be appointed and approved of by the parties, for the examination of the witness on oath by interrogatories or otherwise. And a similar application may be made, though the witness be within the jurisdiction. If you apply to the Court, then deliver a brief to counsel, accompanied with the affidavit above mentioned, stating that the witness is out of the jurisdiction of the Court (*u*).

The rule obtained hereon is a rule *nisi*, a copy of which should be served on the opposite attorney. If you apply to a Judge at chambers, then take out a summons and serve it on the opposite attorney, and attend the same as in other cases. The rule or order will be for a commission to issue for the examination of the witness on oath, by interrogatories or *viva voce*, or otherwise, as the Court or Judge may direct. By the same or any subsequent order, the Court or Judge may give such directions as they may think fit, touching the time, place, and manner of the examination, and other matters connected with it. (1 *W.* 4, *sess.* 2, c. 22, s. 4). On this rule or order being made absolute (*v*), serve a copy of it on the opposite attorney. If the examination is not to be *viva voce*, get your interrogatories prepared as directed *ante* 251, and let them be

(*t*) *Duckett v. Williams*, 1 C. & J. 510, 138

1 Tyrw. 502, 1 Dowl. P. C. 201.

(*u*) See the forms, Chit. Forms, 137, 130.

(*v*) See the forms, Chit. Forms, 137,

signed by counsel (y); engross them on parchment, and serve a copy of them on the opposite attorney. The opposite attorney may also draw up interrogatories by way of cross-examination, which he will deliver to you. If the examination is to be *vidâ voce*, then there will be no written interrogatories. Sue out and serve a commission (x) directed to the Judges or commissioners, according to the rule or order: annex the interrogatories (if any) to it. The Judges to whom the commission is directed have the like power to compel and enforce the attendance and examination of witnesses as the Court, whereof they are Judges, possesses for that purpose, in suits or causes depending in such Court, and they will act accordingly in their mode of requiring the attendance of the witness, at the same time following the directions of the commission. They will give the agents of both parties notice of the time and place of examination. Take the witness, or he will attend at the time and place appointed. If he be in custody, a writ of *habeas corpus ad testificandum*, should be procured, as in other cases. (*Ante*, 247). The Judges to whom the commission is directed, must examine the witness on oath, or on his affirmation if a quaker. They may swear the witness. If he swear falsely, he will be guilty of perjury. (1 *W. 4*, *sess. 2*, c. 22, s. 7). His examination should be conducted by the same rules as the examination of a witness on a trial at *Nisi Prius*. They should afterwards certify the depositions to the Court of King's Bench, under their seals (y). If the witness disobey the process of the Judges to whom the commission is directed, he may be punished by them as in other cases of contempt. (1 *W. 4*, *sess. 2*, c. 22, s. 2).

The costs of the rule or order, and of the proceedings thereon, will be costs in the cause, unless otherwise directed by the Court or Judge making the order, or by the Judge before whom the cause is tried. (1 *W. 4*, *sess. 2*, c. 22, s. 9). The costs of the writ or commission issued, where the witness is out of the jurisdiction of the Court, are in the discretion of the Court issuing the same. (*Id.* s. 3) (z). Before these enactments the party applying to have his witness examined on interrogatories was not allowed the expenses of the examination, or of the copies of depositions, &c. in taxing his costs, if he succeeded (a), unless the contrary were specially mentioned in the rule.

The examinations and depositions certified under the hand of the commissioner, Master, or other person, taking the same, may be received and read in evidence without proof of the signature to such certificate (b). But they cannot be so read without the consent of the opposite party, unless the Judge be satisfied by proof that the witness is out of the jurisdiction of the Court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial. (1 *W. 4*, *sess. 2*, c. 22, s. 10). You should, therefore, in general be prepared at the trial to prove such absence, sickness, &c. Be-

(w) See the forms, *Chit. Forms*, 142, 143.

(x) See a form, *Chit. Forms*, 140.

(y) *Atkins v. Palmer*, 4 B. & Ald. 377; *Duncan v. Scott*, 1 Camp. 101.

(z) See the cases decided on the 13

G. 3, c. 63.

(a) *Stephens v. Crichton*, 2 East, 259; *Taylor v. Royal Exchange Company*, 8 Id. 393. See *Muller v. Hartshorne*, 3 B. & P. 556.

(b) See *Duncan v. Scott*, 1 Camp. 110.

fore this statute, where a witness was examined before a Judge upon interrogatories, it was holden that his depositions could not be read whilst he continued in England (c). But when he had actually sailed on his voyage, the depositions were allowed to be read, although the vessel in which he sailed was, at the time of the trial, driven back into port by contrary winds (d).

By 13 G. 3, c. 63, s. 44, if a suit be commenced in any of the Courts at Westminster, for a cause of action which arose in India, the Court may award a writ in the nature of a *mandamus* or commission, for the examination of witnesses in that country; and upon the examination being returned, it shall be allowed and read as evidence at the trial (e). The powers and provisions of this act are extended by the 1 W. 4, sess. 2, c. 22, s. 1, to all colonies, islands, plantations, and places under the King's dominions in foreign parts, and to the Judges of the Courts therein. In a late case, where the plaintiff had applied for and obtained a writ of *mandamus*, under the 13 G. 3, c. 63, s. 44, for the examination of witnesses in India, and the writ and depositions were returned to this country, but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it, and the plaintiffs obtained a verdict; it was held, they were not entitled to the costs attending the writ, or of the office copies of the depositions (f). Where the defendant obtains depositions from India under this act, the plaintiff is entitled to copies at his own expense (g), and if the plaintiff gains the cause, he is entitled to the costs of cross-examining those witnesses (h).



## SECT. 7.

### *The Nisi Prius Record.*

1. *Form of the Nisi Prius Record*, 254.
2. *When and how sealed and passed*, 256.

#### 1. *Form of the Nisi Prius Record.*

THE *nisi prius* record consists of four parts: the first *placita*; the pleadings, &c.; the second *placita*; and the *jurata*. It is made up by the attorney; and must be written on one or more skins of parchment (according to the length of the issue); the two *placita*, in a

(c) *Anon.* 2 Salk. 601.

(d) *Funsick v. Agar*, 6 Esp. 92; and see *Ward v. Wells*, 1 Taunt. 461; *Falsoner v. Hanson*, 1 Camp. 172.

(e) See *Rex v. Jones*, 8 East, 31; *Francisco v. Gilmore*, 1 B. & P. 177; *Grillard v. Hoare*, 1 B. & B. 519, 4 Moore, 313, S.C. See form of affidavit for rule,

*Chit. Forms*, 143; of the rule, *Id.* 144; and of the *mandamus*, *Id.*

(f) *Fairlie v. Parker*, 1 M. & P. 438.

(g) *Davis v. Nicholson*, or *Davidson v. Nichol*, 7 Bing. 358, 5 M. & P. 185, 1 Dowl. P. C. 220, S. C.

(h) *Whytt v. M'Intosh*, 8 B. & Cres. 317, 2 M. & R. 133, S. C.

large text hand; the pleadings, &c. and the *jurata*, in a full fair engrossing hand. (See the form, *Chit. Forms*, 146).

*First placita.*] The first *placita* is in this form: "*Pleas before our lord the king at Westminster, on                      , the                      day of                      , A. D. [the day on which the issue was made up], as of                      term, [being the term in, or, if made up in vacation, then the term preceding which the issue is made up], in the                      year of the reign of our sovereign lord William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith, and in the year of our Lord 1834.*"

Next, write the number of your issue-roll thus, "*Roll 526,*" underneath the *placita*, at the right hand side of the sheet.

*The pleadings, &c.*] Next copy the issue verbatim to the end of the award of the *venire*.

*Second placita.*] After the award of the *venire*, write the second *placita*, thus, "*Pleas before our lord the king at Westminster, of                      term*" [being the term in or after which the cause is intended to be tried] "*in the                      year of the reign of our sovereign lord William the Fourth*" [&c. as in the first *placita*.]

*Jurata.*] Next follows what is termed the "*jurata*." If the cause is to be tried at Westminster or in London, enter it thus: "*Middlesex [or 'London'] to wit: The jury between A. B. by his attorney, plaintiff, and C. D. defendant, in an action on promises [or as the form of action may be] is respited before our lord the king at Westminster, until                      [here insert the return of the distringas]\* unless the right honourable Sir Thomas Denman, Knight, his majesty's chief justice, assigned to hold pleas in the Court of our said lord the king before the king himself, shall first come on                      , the                      day of                      [insert the first day of the sittings at which the cause is to be tried] at Westminster in the county of Middlesex [or 'at the Guildhall of the city of London'] according to the form of the statute in such case made and provided,\* for default of the jurors, because none of them did appear: therefore let the sheriff have the bodies of the said jurors, to make the said jury between the parties aforesaid, of the plea aforesaid, accordingly; the same day is given to the parties aforesaid, at the same place.*" (See the form, *Chit. Forms*, 146).

When the trial is to be at the bar of the Court, the above *nisi prius* clause, between the asterisks, from the word "*unless*" to the word "*provided*" inclusive, must be omitted; and the *jurata* will then stand thus: "*The jury,*" &c. "*is respited before our lord the king at Westminster, until the                      day of                      , for default of the jurors, because none of them did appear: therefore,*" &c. as above.

If the cause is to be tried at the assizes, insert the county in the margin of the *jurata*; and, instead of the above clause of *nisi prius* between the asterisks, insert the following: "*Unless his majesty's justices assigned to take the assizes in and for the county of                      , shall first come on                      [the commission day] at                      [the place where the assizes are to be holden] in the said county, according to the form,*"

c. as above to the end. Then add, in the same paragraph, the entry termed the "*sciendum*," thus: "*And be it known that the king's writ on record was delivered to the undersheriff of the said county, on the day of [insert the teste of the venire facias] A.D. , before our lord the king at Westminster, to be executed according to law, at his peril.*" (See the form, Chit. Forms, 146).

In country causes (excepting such as are to be tried in counties palatine), the record of *nisi prius* concludes with the *sciendum*; in town causes, it concludes with the *jurata*. But when the action is to be tried in a county palatine, there is no second *placita*, *jurata*, or *sciendum* entered on the record of *nisi prius*, but it concludes with the award of the *mittimus*, as in the issue roll. (See Chit. Forms, 124).

[*Variance between record and issue.*] Any variance between the record and the issue should be objected at the time of the trial; for the Court will not in general set aside a verdict for such a cause (*m*); particularly if it be not shewn that the issue agrees with the prior proceedings (*n*). Where the *nisi prius* record varied from the issue, but agreed with the declaration delivered, the Court held the variance to be immaterial (*o*).

[*When amended.*] The practice as to allowing the amendment of the *nisi prius* record shall be more fully considered, *post*, Vol. 2, Book 4, Part 1, Chap. 28. It will suffice here to observe, that the *nisi prius* record may be amended by the plea roll (*p*); and this may be done at *nisi prius*, by consent of the parties, even after the trial has been called on (*q*); but not without such consent, if it be in a matter of material allegation (*r*). By the 9 G. 4, c. 15, and 3 & 4 W. 4, c. 42, s. 23, *post*, 282, certain variances between matters stated in the record, and those proved in evidence, may be amended at the trial by leave of the Judge.

## 2. When and how the Nisi Prius Record is sealed and passed.

When the record of *nisi prius* is engrossed, get a roll of the day and term the issue is intituled, and get a number for it, in the manner directed *ante*, 221. Make an incipitur of the issue (that is, proceed in your entry as far as a part of the declaration) (*s*) on the issue roll, (R. M. 5 A. r. 1; and see R. E. 1657; R. T. 1 J. 2) (*t*), and take it, together with the record of *nisi prius*, and a copy of the issue, to the clerk of the judgments, who will enter the issue, and mark the record, roll and issue paper; pay him 3s. 6d. for the first ten sheets, and 1s. for every six sheets after. At the same time, docket your entry, as directed *ante*, 223. Then take the record to the clerk of *nisi prius* for

(m) *Leeman v. Allen*, 2 Wils. 160. See *Shorter v. Helbutt*, Barnes, 476; *Cooper v. Spencer*, 1 Str. 641. See *vide Drummond v. Burt*, 2 M. & M. 136.

(n) *Doe d. Cotterill v. Wylie*, 2 B. & Ald. 472; *Jones v. Tatham*, 8 Taunt. 634.

(o) *Shepley v. Marsh*, 2 Str. 1131.

(p) *Say*, 76, *Leeman v. Allen*, 2 Wils.

(q) *Murphy v. Marlow*, 1 Camp. 57.

(r) *Paine v. Bustin*, 1 Stark. 74; *Doe Manning v. Hay*, 1 M. & Rob. 243; *Drummond v. Burt*, 2 M. & M. 136; *Whitehead v. Scott*, *Id.* 137, n.

(s) In proceedings in actions removed from inferior courts, &c., this incipitur is in a different form.

(t) See the form, Chit. Forms, 128.

*London and Middlesex if the cause is to be tried in London or Middlesex, or to the clerk of nisi prius for the circuit on which the cause is to be tried, by whom it will be examined, sealed, and passed; pay 7s. 6d. for the first eight sheets, and 7s. for every eight sheets after; and pay 6d. for sealing. (R. M. 5 A. r. 1, a).*

If the cause is to be tried in a county palatine, after getting the *nisi prius* record sealed and passed in the manner now mentioned, engross a *mittimus* on a plain piece of parchment (u); get it signed, (pay 1s. 8d.), and sealed (pay 7d.). Send it, together with the record, to the attorney in the country, who will sue out the jury process and get it returned.

In town causes the record of *nisi prius* must be sealed on or before the day appointed by the chief justice in the sittings paper for the trial. (R. E. 7 G. 1). It must, however, be sealed in time to have the cause entered with the marshal. (See the next Section).

In country causes the record cannot be sealed after three weeks from the end of the term, (R. T. 31 C. 2), unless a Judge's order be obtained for that purpose. This order, however, is now granted of course; and upon paying the clerk of *nisi prius* 2s. for it, he will seal the record at any time before the assizes, and obtain the order afterwards at his leisure. (Id. a).

When the cause stands over from one sitting to another, you must (before the sitting to which the cause stands over) get the marshal to alter the jurata; pay him 5s. Get the *distringas* from him; alter it, and get it resealed; and get the record of *nisi prius* also resealed, (R. E. 33 G. 3, r. 1), otherwise the cause cannot be tried, and the marshal is prohibited from inserting the cause in the daily list for trial. (Id. R. M. 6 G. 4) (v).

A copy of the particulars (if any) of the plaintiff's or of the defendant's set-off must be annexed to the record, at the time it is entered with the Judge's marshal. (R. T. 2 W. 4, r. 6, post, 265).



## SECT. 8.

### *The Jury Process.*

The two writs, by virtue of which a jury are summoned in this Court, are the *venire facias* and the *distringas*. The *venire facias* merely commands the sheriff that he cause to come before the king at Westminster, on a day therein mentioned (being a day previous to the intended trial of the cause) twelve free and lawful men, &c. to make a certain jury of the country between the parties. Upon the jurors (supposed to be summoned by virtue of this writ) making default at the return of it, the *distringas* is supposed to issue. This writ commands the sheriff to *distrain* the jurors, already returned on the *venire*, by their goods, so that he may have their bodies before the king at Westminster, on a day therein mentioned, to make a certain jury between the parties, &c. In practice, however, the *venire* and *distringas* are sued out at the same time; and, upon being deli-

(u) See the forms, Chit. Forms, 150, 151. (v) See *Crowder v. Cooke*, 2 Wils. 144.



vered to the sheriff or his agent, he immediately returns them, and causes the jurors to be summoned. The jurors must afterwards appear at the place of trial, according to the exigency of the writ and summons.

This is the jury process, when the trial is intended to be at bar. It is the same, however, when the trial is intended to be at *nisi prius*; excepting that the *venire*, in this latter case, may be made returnable "forthwith," and the *distringas* is made returnable before the king on the return day next after the time the cause is intended to be tried, *unless before* that time the chief justice or the judges of assize should come on a certain day therein mentioned, to the place intended for trial; and which of course is always the case; and the sheriff accordingly summons the jury to attend at the time and place mentioned in this clause of *nisi prius*.

*Venire.*] The *venire* must be directed according to the award of it on the roll; that is, if the *venire* have been awarded to the sheriff, or to the coroner or elisors, the *venire* must be directed accordingly to the sheriff, or coroner, or elisors, respectively.

It shall direct the sheriff "to return twelve good and lawful men of the body of his county, qualified according to law; and the rest of the writ shall proceed in the accustomed form." (6 G. 4, c. 50, s. 13. See the forms, *Chit. Forms*, 154, 155).

In substance, also, the *venire* must correspond with the award of it on the roll. Thus, if the award be general, to make a jury between the parties of the plea or action, whatever it may be, the writ must also be general; or if the award be special,—as to try issues in fact, and assess damages upon issues in law,—or to try issues as to defendants who have pleaded, and to assess damages against defendants who have allowed judgment to go by default,—the writ must also be special. (See the forms, *Chit. Forms*, 154, 155).

Before the recent act of 3 & 4 W. 4, c. 67, s. 2, the *venire* must have been tested and returned in *term* time only, and it used to be tested on the first day of the term in or after which the cause was to be tried, and was made returnable, on some day certain in term, before the trial; or if it were a country cause, then on the last day of the term. But now by that act, except in trials at bar, "the writ of *venire facias* *juratores* may be tested on the day on which the same shall be issued, and be made returnable *forthwith*." This enactment was passed, as it should seem from the recitals therein, to avoid the incongruity in the *venire facias* being tested in the preceding term, in an action commenced and tried in the vacation after that term. It will be observed that the act does not imperatively require that the *venire* shall be tested in vacation, or returnable "forthwith;" and that the old teste and return may be adopted. It should seem also, that although the act says that the return may be "forthwith," yet that it might be on any particular day, whether in term or vacation, before the trial. It is not necessary, in any case, that there should be 15 days between the teste and the return of the writ. (13 C. 2, st. 2, c. 2, s. 6).

If this writ be awarded, and the cause be not tried for several terms, new *venires* are supposed to have been issued from term to term, and

the cause continued by *vicecomes non misit breve*; and which continuances are finally entered on the roll, and should be so before the trial, if it be necessary to suggest an intervening death or other matter. In fact, however, the *venire* seldom, if ever, issues till the term when the cause is to be tried (x).

*Distringas.*] The *distringas* must be directed in the same manner as the *venire*. It must also correspond with the *venire* in substance; and be general or special, as the *venire* is general or special.

The *distringas*, in actions by *original*, where that process was used for the commencement of a personal action, was tested on the *quarto die post* of the return of the *venire*, and, in causes at *Nisi Prius*, must have been returnable on the first general return after the trial, where-soever, &c. In actions by *bill*, when that process was used for the commencement of a personal action, it was tested on the return day of the *venire*, and, in causes at *Nisi Prius*, was returnable on the first particular return or day certain in the term after the trial. And now, in actions commenced by the new process prescribed by the 2<sup>W.</sup> 4, c. 39, the *distringas* is tested on the return day of the *venire*, and in causes at *Nisi Prius* is returnable on the first day in the term after the trial. Or, except in trials at bar, "it may be tested in term or vacation on a day subsequent to the teste of the *venire*." (3 & 4 *W.* 4, c. 67, s. 2). In trials at bar, the *distringas* is made returnable on the day on which the trial is to be had. It is not necessary, in any case, that there should be 15 days between the teste and return of this writ. (13 *C.* 2, st. 2, c. 2, s. 6).

*How, and by whom sued out.*] The *venire* and *distringas* are sued out together; and must, in all cases (except in replevin, or when the defendant proceeds to trial by proviso) be sued out by the plaintiff, even in cases where the defendant has moved for a special jury. They are sued out thus: *Get a blank venire and distringas at the stationer's (y), and fill them up. (See the forms, Chit. Forms, 154, 155). Get them sealed; pay 7d. each; they do not require signing. In Middlesex, take the distringas to the sheriff's office, and get it returned; pay 14s. 8d.; and annex it and the panel to the Nisi Prius record; the venire is not used, and is sued out merely for the purpose of having it allowed in costs (z). In London, you get the distringas returned at the secondary's office, in Coleman-street; pay 4s. 4d. if the jury be common, 8s. 8d. if special. In country causes, you get the venire returned by the sheriff's deputy in town, and the distringas by the under-sheriff in the country; and annex them both, together with the panel, to the Nisi Prius record. If it be intended, however, to try the cause by a special jury, or to have a view, there are some previous steps necessary, which shall be mentioned post, 260, 263.*

If the cause stand over from one sitting to another, the *distringas* must be resealed previously to the sitting to which it stands over; otherwise the marshal must not insert it in the daily list of causes for trial, and the cause cannot be tried. (*R. E.* 33 *G.* 3, r. 1; *R. M.* 6 *G.* 4).

(x) *Gilb. C. P.* 83; *Tidd*, 778.

(y) See *Taylor v. Lake*, 1 *Str.* 575.

(z) 1 *Sellon*, 427.

*How returned in common jury cases.*] The stat. 6 G. 4, c. 50, directs the mode in which the jurors, in common jury cases, are to be chosen, summoned, and returned. And by sect. 15, the sheriff or other person to whom the *venire facias* is directed, shall, upon his return thereto, annex to it a panel containing the names alphabetically, and the additions and places of abode, of not less than 48 nor more than 72 persons qualified to serve on juries; but the Judge of assize or *nisi prius* may, by order under his hand, direct a greater or lesser number of persons than that above mentioned, to be returned and summoned, if he shall so think fit. And by sect. 22, the justices of assize may direct the sheriff to return two sets of jurors, not exceeding 144 in all, the one to attend for a certain number of days at the beginning of the assizes, the other for the residue of the assizes, and the sheriff shall summon them accordingly. Also, by sect. 15, upon the return of the *distringas*, the sheriff shall annex to it a panel, containing the same names as were returned in the panel to the *venire*, with their additions and places of abode; and the persons named in these panels, and none other, shall be summoned to serve on juries at the then next assizes or sessions of *nisi prius* for the county named in such writs of *venire* and *distringas*.

*How returned in special jury (a) cases.*] This Court at all times might, with the consent of parties, order the master to nominate and strike a special jury; and in trials at bar, might do so, upon the application of either of the parties, without the consent of the other. (*See R. 8 W. 3, r. 2*). And now, upon the motion of either the plaintiff or defendant in any cause pending in any of the Courts at Westminster or the counties palatine, such Court shall order a special jury to be struck before the proper officer, in the same manner as they have usually ordered the same; and the jury so struck shall be the jury to be returned for the trial of the issue. (6 G. 4, c. 50, s. 30). The party, however, upon whose application it is struck, shall bear all the expenses occasioned by the trial of the cause by such special jury, and shall not be allowed, upon taxation of costs, any more or other costs than he would have been entitled to, if the cause had been tried by a common jury, unless the Judge shall immediately after the verdict certify upon the back of the record that it was a proper cause to be tried by a special jury. (6 G. 4, c. 50, s. 34). Where such certificate was applied for, the day after the trial, the Court held that the application was made too late (b). Where no certificate is granted, the practice is to allow the party only the costs actually paid to the attending jury in Court (c). If a case be not gone into at the trial, the Judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a large amount, and because persons of considerable rank are called on their *subpœnas* (d). Where a case turned solely on a question of law, and

(a) As to a good jury, in executing a writ of inquiry, see Vol. 2, 514.

(b) *Waggett v. Shaw*, 3 Camp. 316.

(c) *Cureum v. Durham*, 2 Chit. Rep.

154; *Calvert v. Gordon*, 3 M. & R. 124, 128.

(d) *Orme v. Crockford*, 1 C. & P. 537.

there was no fact in dispute between the parties, *Abbott*, C. J., refused to certify for a special jury (e). Before the 3 & 4 W. 4, c. 42, it was held, that a defendant, who had applied for a special jury, was not entitled to the costs of that jury, where the plaintiff was nonsuited (f); but now, by that act, sect. 35, the defendant will be entitled to those costs in cases where the plaintiff is nonsuited, as well as where a verdict is found against him.

The manner of procuring this special jury is thus: *Get counsel's signature to the motion paper; take it to the office of the clerk of the rules, and draw up the rule; pay 6d. (g).* In trials at bar, however, it should be observed, the motion for such trial includes this motion for the special jury; and not being a motion of course, it must be made by counsel in Court (h). *Get an appointment from the master on the rule; and serve a copy of the rule and appointment upon the opposite attorney; and also upon the under-sheriff, or in London upon the secondary.* In London and Middlesex, at the sittings after term, this must be done, and the cause marked in the marshal's book as a special jury cause, on or before the day preceding the adjournment day in Middlesex and London respectively. (*R. H. 44 G. 3; R. T. 30 G. 3*). Where it was served at six o'clock in the evening preceding the day fixed for the trial, (which was at one of the sittings in term), and the plaintiff treated it as a nullity and had the cause tried by a common jury, the Court held that he had done rightly, saying that, to make a rule for a special jury a *supersedeas* to common jury process, it must be served early enough to enable the other party, by using ordinary diligence in the usual course of business, to insure the attendance of a special jury (i). If the defendant's attorney do not serve it, and mark the cause as a special jury cause within due time, the cause may be tried by a common jury, and the defendant lose the benefit of his rule. *At the time appointed, attend at the master's office, when the sub-sheriff will also attend with the jurors' book, and the special jurors' list, and numbers written on pieces of parchment or card corresponding with the names in such list; the master then puts the numbers into a box, and, having shaken them together, draws out forty-eight of them, one after another, and, as each number is drawn, refers to the corresponding number in the special jurors' list, and reads aloud the name designated by such number.* *At the time of reading each name, either party or his attorney may object to the person named as being incapacitated from serving on the jury, and if he prove the same to the satisfaction of the master, such name shall be set aside, and another number drawn instead thereof, which may in like manner be challenged; and so on, until forty-eight names shall be chosen.* If the whole of the forty-eight names cannot be obtained in this way, the master may nominate the remainder in the manner he has heretofore done. (6

(e) *Wemyss v. Greenwood*, 2 C. & P. 483.

(f) *Wood v. Grimwood*, 10 B. & C. 689.

(g) See the form, Chit. Forms, 156.

(h) See post, Chap. 3, Sect. 1.

(i) *Gunn v. Honeyman*, 2 B. & Ald. 400, 1 Chit. Rep. 234, S. C.; vide infra.

G. 4, c. 50, s. 32). Or, by consent of the parties, the jury altogether may be nominated in the manner hitherto adopted. (*Id.* s. 33). And if the cause of action have arisen in a county of a city or town (other than London), the jury must be nominated in the manner hitherto adopted. (*Id.* s. 36). *The master's clerk will furnish each party with a list of the names of the forty-eight jurors, their additions and places of abode; pay the master two guineas, the sub-sheriff two guineas (j), and the master's clerk 5s. (See R. T. 8 W. 3, r. 2, a). When you are ready to strike the special jury, get another appointment from the master, and serve a copy of the rule, with the second appointment, on the opposite attorney. Attend at the time appointed, and the master will strike out twelve names for each party, at their desire, beginning with the plaintiff; or if either of the attorneys do not attend, the master will proceed ex parte, and strike out twelve names for the party absent. (See R. T. 8 W. 3, r. 2) (k). The master's clerk will then make out lists of the twenty-four names remaining, and give them to the attorneys.* It is no objection that there has been a change of sheriffs after the forty-eight were nominated, and before the parties attended the master to strike the jury (*l*). *Let the plaintiff's attorney make out a special distringas, containing the twenty-four names in the list (m); and get it sealed and returned, as before directed. By rule T. T. 5 G. 4 (n), if the distringas be directed to the sheriff of Middlesex, the notice for summoning the jury and the distringas must be left at the sheriff's office before seven o'clock in the evening next but one before the day on which the jury shall be required to attend; (Sunday not included); and notices for countermanding the summoning of special juries shall be before twelve o'clock at noon of the day next preceding that for which the jury was to have been summoned. By stat. 6 G. 4, c. 50, s. 25, in all counties, &c. except in London and Middlesex, the special jurors shall be summoned three days at least before the day on which they are required to attend; and consequently the distringas must be left at the sheriff's office in sufficient time to have the jurors summoned accordingly.*

If none of the special jurors mentioned in the *distringas* appear in court, the cause cannot be tried, unless, perhaps, by consent. Where, besides the special jury panel, there was also a common jury panel returned, and as none of the special jurors appeared, the plaintiff proposed to have the cause tried by a common jury, which was allowed by the Judge, notwithstanding the defendant's protesting against it, and a verdict was found for the plaintiff; the Court set aside the verdict, although it appeared that the defendant had made defence at the trial (*o*). But if the defendant has not summoned the special jurors

(j) The sheriff will not be allowed extra expenses of summoning special jurors, on account of their residing at a distance from each other; and the Court will order the sheriff to refund the money received on this account, although he has actually expended it

all. *Lane v. Savell*, 1 Chit. Rep. 175.

(k) *Anon.* 1 Salk. 405; Cowp. 412.

(l) *Rex v. Hart*, Cowp. 412.

(m) See the form, Chit. Forms, 156.

(n) 3 B. & C. 177, 4 D. & R. 336.

(o) *Holt v. Meddowcroft*, 4 M. & Sel. 467.

in time, the cause will be tried by a common jury *(p)*. So, if any of the jurors appear, either party may then pray a *tales* and the cause must then proceed *(q)*. If, however, the cause go off for default of special jurors, no new jury can be struck, but the cause must be tried by the jury first appointed *(r)*.

Obtaining a rule for a special jury, is now a common mode of delay adopted by defendants, as they can in general gain a term by it. When this is evidently the case, and the cause is not such as would require a special jury, the Chief Justice, but not the full Court, upon motion, will, perhaps, order the action to be tried at one of the sittings in term *(s)*, or the Court will probably discharge the rule for a special jury, unless the defendant consent that the plaintiff, if he have a verdict, shall have judgment of the term *(t)*. In a late case, the Court refused to discharge the rule for a special jury, on the ground that the defendant had obtained it in June, 1831, and, up to the Michaelmas term following, had omitted to strike the jury, although the cause stood for trial in July *(u)*.

*View, how and in what cases.]* In cases where it may appear to the Court, or to a Judge in vacation, to be proper and necessary that the jury should have a view of the premises in question, previously to the trial, they have authority, by stat. 6 G. 4, c. 50, s. 23, to order in the *distringas* that the sheriff shall have six or more of the jurors, returned to try the cause, (who shall be consented to by the parties, or nominated by the sheriff in case the parties cannot agree) at the place in question, some convenient time before the trial, and that the place in question shall be then and there shewn to them by two persons to be named in the writ, and appointed by the Court or Judge. And the sheriff shall afterwards, by a special return upon the *distringas*, certify that the view has been had, according to the command of the said writ, and shall specify the names of the viewers. (*Id.*) The Court or Judge may also, if they think fit, require by the rule that the party applying for it shall deposit in the hands of the under-sheriff a certain sum of money, for payment of the expenses of the view. (*Id.*) And by a rule of Court made since this statute (*R. T. 7 G. 4*) *(x)*, it is ordered that, upon every application for a view, the sum to be deposited with the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if the distance at which the view is to be made, and the distance thereof from the office of the under-sheriff, do not exceed five miles; and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles; and

*(p)* *Archer v. Bamford*, 1 C. & P. 64.

*(q)* *Snook v. Southwood*, R. & M. C. N. P. 429. *Vide post*.

*(r)* *Rez v. Perry*, 5 T. R. 453; but see *Mayor of Doncaster v. Coe*, 3 Taunt. 404.

*(s)* *Maltby v. Moses*, 1 Chit. Rep. 489; *Anon. Id. n.*; *Johnson v. Gas Light*

*Company*, 7 Taunt. 390; *Roberts v. Bradshaw*, 1 Stark. 31. See *Briggs v. Dixon*, 4 Moore, 414, 470, and *post*.

*(t)* *Craddock v. Davis*, 1 Chit. Rep. 176, *Blaxam v. Brown*, 4 Taunt. 470; *Doe v. Lorimer*, 1 Chit. Rep. 236.

*(u)* *Andrews v. Thornton*, 8 Bing. 64.

*(x)* 5 B. & Cres. 795; 8 D. & R. 757.

if such sum be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff; and that the under-sheriff shall pay, and shall account for, the money so deposited, according to the scale set down in the rule. The Court will disallow the costs of a view, unless the names of the viewers are inserted in the writ of view, as directed by the 23rd section of the above act (y).

In actions of waste, of trespass *quare clausum fregit*, and nuisance, the motion for a view was always of course, and required only counsel's signature; but in other cases a special application must formerly have been made to the Court in term time, or to a Judge in vacation, for a rule *nisi* or order, upon an affidavit of the circumstances (z). Now, however, by the late rule of *H. T. 2 W. 4, r. 63*, the rule for a view may, in all cases, be drawn up by the clerk of the rules, on the application of the party, without affidavit or motion for that purpose. And in all cases it is made part of the rule or order, that, if no view be had, or if had by less than the number of jurors mentioned in the rule, &c. the trial shall nevertheless proceed, without any objection being made on that account, or on account of any defect in the return of the *distringas*; that no evidence shall be given on either side, at the time of taking the view; and, in ordinary cases, that the expenses of taking it shall be equally borne by both parties (a).

*Draw up a præcipe or memorandum of the rule you want. Get from the opposite attorney a memorandum of the name and place of abode of his shewer; and take it, together with a similar memorandum of your own shewer, and also of the time and place of meeting, &c. to the clerk of the rules, and draw up the rule. Pay him 7s. If the opposite party will not name a shewer, the Master will, on an appointment being obtained for that purpose, name one ex parte. Serve a copy of the rule on the opposite attorney. Leave the original rule at the sheriff's office, together with a list of the jury, if special, and he will summon them; or, if common, he will summon such as he may think fit. Pay him two guineas, and one guinea for his attendance (b). Deposit with him the expenses of the view, if ordered by the Court, according to the above rule of Court of T. T. 7 G. 4.*

*Venire de novo.*] If a plaintiff, or a defendant in replevin, having sued out a *venire*, and a *distringas* with a clause of *nisi prius*, shall not afterwards proceed to trial, he may (excepting in cases where a view is directed) have a new *venire*, commanding the sheriff that he cause to come *anew* twelve good and lawful men of the body of his

(y) *Taylor v. Thompson*, 7 Bing. 403, 5 M. & P. 255, 1 Dowl. P. C. 218, S. C.

(z) *Tidd*, 797, 1 Imp. B. R. 399.

(a) See form of the rule in common jury cases, Chit. Forms, 58; in special jury cases, *Id.* 159; and see 1 Bur. 253.

(b) See also the forms of *distringas*, where a view is to be had, Chit. Forms, 159, 160. See also the form of a *mittimus* to a county palatine, where a view is to be had, Chit. Forms, 151.

county, qualified according to law, &c. so proceeding as in the ordinary writ; and the plaintiff may thereupon sue out a *distringas*, and proceed to trial, as if no former *venire* had issued; and so, *toties quoties* as the case shall require. (6 G. 4, c. 50, s.50) (c). In the same manner, if the plaintiff do not go to trial on the *venire* first sued out, the defendant may sue out a *venire de novo*, if he wish to proceed to trial by proviso. (*Id.*).

This statute, however, does not extend to a trial at bar. In this case, therefore, the party must proceed as at common law, namely, by suing out an *alias* and *pluries distringas*; and the *alias* or *pluries distringas* is not to issue until after the former writ and panel have been delivered to the master, in order that the issues forfeited may be estreated. (*R. H. 15 C. 2, r. 2*).

As to a *venire de novo* after verdict, see Vol. 2, Book 4, Part 1, Ch. 27, title "New Trial."

## SECT. 9.

### Entry of the Cause for Trial.

*At bar.*] When the trial is to be at bar, the cause is entered with the clerk of the papers; and the day appointed for it must be entered in his book, previously to notice of trial being given (d). *Leave the record with him; leave him also a draft of the issue, and he will make out four copies of it for the Judges, and have them delivered.*

*At Nisi Prius, in town.*] Take the record, with the *distringas* and panel annexed, to the marshal's office, and enter the cause for trial; pay him 11s. 8d. A copy of the particulars of plaintiff's demand, and also particulars (if any) of the defendant's set-off, must be annexed to the record by the plaintiff's attorney at the time of this entry. (*R. T. 1 W. 4, r. 6*). Where the plaintiff annexed to the record particulars varying from those delivered to the defendant, and there being no evidence of the particulars delivered, the Court granted a new trial without costs, but refused to nonsuit the plaintiff because the defendant was not in a condition to raise the question at the trial, and the point was not reserved (e). There is no occasion for the opposite party to prove the delivery of the particulars when thus annexed to the record (f).

Causes intended to be tried in London or Middlesex, at any of the sittings in term, must be entered with the marshal two days previously to the sittings; otherwise the marshal, at the request of the defendant or his attorney, may enter a *ne recipiatur*. (*R. H. 15 & 16*

(c) See form of *venire de novo*, Chit. Forms, 156.

(d) 2 Lill. Pr. R. 608.

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(e) *Morgan v. Harris*, 2 C. & J. 461.

(f) *Macarthy v. Smith*, 1 M. & Scott, 227; 8 Bing. 145; 1 Dowl. P.C. 253, S.C.



C. 2, r. 2). Causes intended to be tried at the sittings after term, must be entered, and the records delivered to the marshal, at the times following; viz. the causes in Middlesex, the first day of the sitting after term in Middlesex; and the causes for London, two days before the adjournment-day in London. (*R. II. 34 G. 3, r. 2*). Where the cause is to be tried at the sittings after term, a *ne recipiatur* cannot be entered until after proclamation made by order of the chief justice for bringing in the records; and then, if the record be not brought in, the defendant's attorney may enter a *ne recipiatur*. (*R. M. 4 A. a*). But, although, regularly, before a cause is entered for trial, the record of *Nisi Prius* should be brought into the marshal's office, this is not observed in practice; and causes are frequently set down for trial, and afterwards settled, before the record is carried in (*g*).

Also, in special-jury causes in London and Middlesex, the rule for the special jury must be served, and the cause marked as a special jury cause in the marshal's book, on or before the day preceding the adjournment-day in Middlesex and London respectively: otherwise the cause cannot be tried. (*R. H. 44 G. 3*).

*When the cause is made a remanet, get the marshal to alter the jurata, and alter the distringas in conformity with it: get the record and distringas resealed; annex the distringas to the record; and leave it with the marshal.*

*[At the assizes.] When you have passed the record, as directed ante, 256, get the venire returned by the sheriff's deputy in town; and send the record, venire, and distringas, to the attorney in the country. Let him get the distringas returned by the under-sheriff; and, having annexed the venire, distringas, and panel to the record, let him take them to the Judge's lodgings, and enter the cause with the marshal; pay 4s. 8d. The writ and record must be entered together, otherwise the marshal shall not receive them. (R. T. 10 & 11 G. 2). Annex the particulars of demand or set-off, if any, to the record at the time of entering, as in the case of a trial in town. (Ante, 265).*

The record must be entered with the marshal before the first sitting of the Court after the commission-day; (*R. H. 14 G. 2*) (*h*); except in the counties of York and Norfolk, and in the city of Norwich; and in the county of York, on or before the second day after the commission-day, (*Id.*), unless otherwise ordered by the Judge; and in the county of Norfolk and city of Norwich, before the sitting of the Court on the day after the commission-day. (*R. H. 32 G. 3*). The Judge sitting at *Nisi Prius*, however, may, in his discretion, and under particular circumstances, allow his marshal to receive a record and enter the cause for trial, after the time limited by these rules. But he will seldom allow it: and this although no *recipiatur* has been entered by the defendant (*i*). The marshal shall order a list of the

(*g*) *Cope v. Holt*, 1 D. & R. 181.

(*h*) See *Skaye v. Foyce*, 3 Camp. 365.

(*i*) *Doe d. Sayer v. Rees*, D. & R.

C. N. P. 6.

causes so entered to be fixed up in some public place in the *Nisi Prius Court*. (*R. H. 14 G. 2*).

If the cause be made a *remanet*, at the assizes, get the record, &c. from the associate; alter the jurata, and sue out a *venire de novo* and *distringas*, as mentioned *ante*, 264, and proceed as in ordinary cases. If there have been a view, however, you cannot sue out a *venire de novo*, but must sue out an *alias distringas*.

If the cause is to be tried in a county palatine, get the record examined, sealed, and passed, as directed *ante*, 256. Write out a mittimus on a plain piece of parchment (*k*); and get it signed (pay 1s. 8d.) and sealed (pay 7d.). Send it, together with the record, to the attorney in the country, who will sue out the jury process, and get it returned. The cause is then entered with the marshal, as in ordinary cases.



#### SECT. 10.

#### The Brief.

The only thing particularly to be observed in framing the brief, is, that every matter in it be stated accurately, and with as much conciseness as is consistent with perspicuity (*l*).

(*k*) See the form, *Chit. Forms*, 150. view. *Id.* 151.

The like where the jury are to have a (*l*) See the form, *Chit. Forms*, 162.

## CHAPTER III.

## PROCEEDINGS, FROM THE TRIAL TO THE VERDICT INCLUSIVE.

## SECT. 1.

*Trial at Bar.*

*In what cases granted.*] A TRIAL at bar cannot at present be had without the leave of the Court, even although the parties consent to it. And it is entirely discretionary with the Court to grant it or not (a), unless the crown be actually and immediately interested, in which case the attorney-general may demand a trial at bar, as of right (b). Also, if a Judge of either bench, or a Master in Chancery be a party, the Court will grant a trial at bar, as of course, without an affidavit (c); and it is said that the Court will not deny a trial at bar, where a barrister or an officer of the Court is a party (d).

In other cases, very sufficient reasons must be stated by affidavit to induce the Court to grant a trial at bar; for, not only is it very expensive to the parties, but it materially delays the other business of the Court (e). The Court, therefore, will in general require, as grounds for granting it, that the matter in dispute be of considerable value, that the inquiry is likely to be of great length, and that difficulties are expected to arise in the course of it (f). But neither the length of a cause, nor the value of the matter in question, are of themselves sufficient grounds for granting a trial at bar; there must also be a probability of difficulty arising in the course of the inquiry (g); and, in order to obtain such a trial upon the ground of difficulty, it is not sufficient to state generally in the affidavit that the cause is expected to be difficult, but the particular difficulty expected to arise must be stated, in order that the Court may judge whether it be a sufficient ground for granting such a trial or not (h).

There are some cases, however, in which a trial at bar cannot be

(a) *Rez v. Burgeses of Carmarthen*, Say. 79; *Rez v. Amery*, 1 T. R. 365.

(b) *Rez v. Hales*, 2 Str. 816; *Reg. v. Banks, Sir Jacob*, 2 Salk. 652, 2 L. Raym. 1082, S. C.; and see *Rez v. Foley*, 1 Str. 52; *Rossa v. Brenton*, 8 B. & Cres. 737, 3 M. & R. 133, S. C.

(c) 1 Sid. 407.

(d) *Astrey's case*, 2 Salk. 651, 6 Mod. 123, S. C.

(e) *Rez v. Burgeses of Carmarthen*,

Say. 79.

(f) *Holmes v. Brown*, 2 Doug. 437; and see *Sandwich's case*, 2 Salk. 644; *Preston v. Lingen*, 1 Str. 479; *Lord Rivers v. Pratt*, 1 B. & B. 265, 3 Moore, 582, S. C.

(g) *Rez v. Burgeses of Carmarthen*, Say. 79; Andr. 271.

(h) *Rez v. Burgeses of Carmarthen*, Say. 79.

had: as where the venue is laid in London: for the citizens are exempted from serving on juries out of the city by their charter (i); or perhaps in a county palatine; it being doubted whether this Court have the power to compel the attendance of the inhabitants upon a jury at Westminster (j). Yet even in these cases, if the jurors consent to waive their privilege, a trial may be had at bar, if the Court deem the matter in dispute a fit subject for such a trial (k).

As it is entirely discretionary with the Court, to grant a trial at bar or not, they may consequently impose what terms they please upon the party applying, as the condition of their granting it; and where such an application was made on the part of a defendant, and it was stated, upon shewing cause, that the plaintiff was poor, and one of his witnesses likely to die before the term, the Court granted a trial at bar, upon the terms of the defendant's consenting that the plaintiff's witness might be examined upon interrogatories, that the cause should be tried by a Middlesex jury, and that *nisi prius* costs should be accepted if the defendant succeeded; but that he should pay bar costs if the plaintiff had a verdict (l). The poverty, however, of the party applying for a trial at bar is no objection to the granting of it; and the Court have granted it, upon the application of a plaintiff who sued *in forma pauperis* (m).

*When to be moved for, &c.*] A trial at bar is never granted before issue joined (n), except in ejectment (o); nor in an issuable term, (*R. M. 4 A. c.*) (p), unless the crown be concerned in interest, (*R. M. 4 A. c.*), or under very particular and pressing circumstances (q). It must be moved for in the term previous to that in which the cause is intended to be tried, unless the action be for lands in Middlesex (r); and it cannot be moved for on the last paper day of the term, unless moved for on the part of the crown (s). The motion is for a rule *nisi* only (t); and in ordinary cases must be supported by an affidavit stating the value of the matter in question, the difficulties likely to arise in the cause, and shewing that the inquiry is likely to be of considerable length.

*Notice of trial, &c.*] The Judges may appoint any day for the trial they think fit. (1 *W. 4*, c. 70, s. 1). There must be fifteen days' notice of trial (u); and previously to its being given, draw up the rule for the trial at bar with the clerk of the rules, and serve a copy of it on the opposite attorney. Then take it to the clerk of the papers, and enter in his book the day appointed for the trial. Leave with him, at the same time, a draft of

(i) 2 Salk. 644, 1 Str. 356.

(j) *Gally v. Clegg*, Say. 47; and see *Rex v. Amery*, 1 T. R. 366.

(k) *Lockyer v. East India Company*, 2 Wils. 136.

(l) *Holmes v. Brown*, 2 Doug. 437.

(m) *Sherwin v. Clarges*, 12 Mod. 318.

(n) *Borough of Christchurch case*, 2 Str. 696.

(o) Say. 155.

(p) Fitzg. 267.

(q) See *Rex v. Foley*, 1 Str. 52.

(r) *Turner v. Barnaby*, 2 Salk. 649, Ca. Pr. C. B. 66.

(s) *Lord Bellamont's case*, 2 Salk. 625.

(t) See form of rule absolute, Chit. Forms, 164.

(u) *Turner v. Barnaby*, 2 Salk. 649. See form of notice, Chit. Forms, 164.

the issue, that he may make out copies of it for the Judges, as mentioned ante, 265. Notice of the trial must be given to the prothonotary, or chief clerk, before giving notice of trial to the opposite party. (*R. H. 2 W. 4, reg. 60.*)

You may countermand your notice of trial, as in other cases; but the cause cannot afterwards be tried, without a new rule being obtained for that purpose; (*R. M. 4 A. c.*); and it is said that a second rule cannot be made between the same parties in the same term (*v.*).

*Jury.*] The action is tried by a jury of the county in which the venue is laid, in the same manner as it would have been if tried at *nisi prius*, unless the parties consent to the contrary (*w.*). The jury is almost invariably special; and the rule for the special jury forms a part of the rule for the trial at bar. When a trial at bar is granted in a penal action, upon motion of the attorney-general, it must be noted on the back of the *distringas*. (*18 El. c. 5, s. 2.*)

If, when the trial is called on, a sufficient number of jurors do not attend, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common law (*x.*); for the stat. 6 G. 4, c. 50, s. 37, which allows the *tales de circumstantibus*, is expressly confined to trials at *nisi prius* and the assizes. And, in one case, the Court ordered the *decem tales* returnable on the day but one following, there being jurors sufficient in town to make a jury; otherwise the trial must have been put off for two terms (*y.*). But before an *alias* or *pluries distringas* with a *tales*, for the trial of an issue at bar, can be sued out, the preceding writ of *distringas*, with a panel of the names of the jurors annexed, must be delivered to the Master, in order that the issues forfeited by the jurors for their non-appearance may be duly estreated. (*R. H. 15 C. 2.*)

*Trial.*] The Judges may appoint any day for the trial they think fit. (*1 W. 4, c. 70, s. 7.*) On a trial at bar, the Master calls over and swears the jury; the clerk of the papers reads the record and written evidence; the clerk of the rules marks all deeds and papers given in evidence, and has the custody of them afterwards until called for; and the master records the verdict (*z.*). The trial is had in the Court of King's Bench at Westminster; and the jury (from the county into which the *venue* was awarded) are obliged to attend there, at their peril, upon the return of the *distringas*. The Chief Justice (or, in his absence, the senior Judge) sums up the evidence (*a.*); and if any question of law arise, either collaterally, or as forming a part of the case, each of the Judges delivers his opinion upon it *seriatim* (*b.*). A bill of exceptions lies upon the reception of improper evidence on

(v) Fitzg. 267.

(w) See *Pierce v. Lord Fauconberg*, 1 Bur. 292; *Holmes v. Brown*, 2 Doug. 437.

(r) See *Denn v. Cadogan*, 1 Bur. 273;

2 Saund. 349a.

(y) *Denn v. Cadogan*, 1 Bur. 273.

(z) Tidd, 9th ed. 751.

(a) See 12 St. Tr. 426.

(b) Id.

a trial at bar (c), and each of the presiding Judges may, on the trial, make such observations to the jury upon the whole case, by way of direction, as he considers to be requisite (d). In all other respects, the trial at bar is the same as a trial at *nisi prius*; and if either party be dissatisfied with the verdict, he may move for a new trial, as in other cases (e).

—◆—

SECT. 2.

*Trial at Nisi Prius.*

At *nisi prius*, every cause shall be tried in the order in which it has been entered, without preference or delay (f); unless it be made out to the satisfaction of the Judge, in open Court, that it is impracticable or inconvenient so to do; who, thereupon, may make such order for the trial of the cause so put off, as to him shall seem just. (*R. H. 14 G. 2; and notice M. 17 G. 2; and see, as to putting off the trial, Vol. 2, Book 4, Part. 1, c. 20*). In town causes, the special jury cases are always deferred until the sittings after term, after the common jury causes have been disposed of; unless the causes be undefended; in which case, one or more days are sometimes appointed by the Chief Justice, in term, for the trial of them (g). *Remanets* are generally taken before fresh causes, unless cause be shewn to the contrary. By 1 W. 4, c. 70, ss. 4, 7, not more than 24 days, exclusive of Sundays, after any Hilary, Trinity, and Michaelmas term, nor more than six days, exclusive of Sundays, after any Easter term, to be reckoned consecutively, immediately after such terms, shall be appropriated to sittings in London and Middlesex, for the trial of issues of fact: provided, indeed, that a day may be specially appointed at any time, not being within such 24 days, for the trial of any cause at *nisi prius*, with the consent of the parties thereto, their counsel, or attorneys.

At the sittings at *nisi prius*, for Middlesex and London, in order to enable the plaintiff to obtain judgment of the term, it is the practice to appoint a particular day, usually the last sittings in the term, for the trial of all actions on bills of exchange and promissory notes, unless an affidavit of defence on the merits, or of other reasonable ground for delay be produced before the trial; and on the appointed day, such actions, unless satisfactory cause be shewn, will be tried; or if counsel appear to defend, then a further day, usually at the first day of the sittings after the term, will be given on the terms, that the plaintiff shall, if he obtain a verdict, have judgment of the term, if the Judge shall think fit; and such causes are tried accord-

(c) *Rowe v. Brenton*, 3 M. & R. 266,  
8 B. & Crea. 737, S. C.

(d) *Id.* 364.

(e) *Bright v. Eynon*, 1 Bur. 396, 2 Ld.  
Ken. 53, S. C.

(f) See *Rez v. Hals*, R. & M. C.N.P.

(g) See *Roberts v. Bradshaw*, 1 Stark.

ingly, unless, on the latter day, it be made appear that the trial ought to be further delayed; and the same practice has also been extended since the 1 *W. 4. sess. 2, c. 7*, to records in actions on bills, notes, and bonds, not entered for trial until the sittings after the term, and in which it is probable that the Judge will certify, so as to entitle the plaintiff to execution during the sittings, although in the vacation (*h*).

At the sittings at *nisi prius* for Middlesex and London, there are written lists of the causes, usually thirty or forty, to be tried each day, affixed on the outside of the Court; and the fact of a cause being in such list, is deemed notice to the attorneys concerned in it, that it may be tried at any time during the day (*i*). Therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the Court refused to grant a new trial, except on an affidavit of the merits, and upon payment of costs (*k*). And in a late case, where the cause was not tried out of its order, but was called on sooner than the defendant's attorney supposed, the Court refused a new trial on any terms, the attorney not having delivered briefs, or prepared himself in any way for the trial (*l*). And even where a cause, which was not in the written list, was tried as an undefended cause in the absence of the defendant's attorney, the Court refused a new trial, there being no affidavit of merits (*m*).

Where it appeared that a defendant intended to obtain an injunction to prevent the trial of a cause, and the plaintiff applied to the Judge at *Nisi Prius*, to try the cause out of its order, for the purpose of anticipating the injunction, the application was refused; and it was said to have been laid down as a rule by Lord Mansfield, that, although he would not wait for proceedings in equity, he would on no account take a cause out of its course at *Nisi Prius*, for the purpose of defeating them. The same rule has also been observed by Lords Kenyon and Ellenborough (*n*). Nor will the Judge take a cause earlier, out of its turn, so as to secure a trial in the same sittings, on the ground that the defendant has died pending such sittings, so as to prevent an abatement of the suit (*o*); nor will the Judge try a cause out of its turn, to allow an agreement to be sent to the stamp-office, to get it properly stamped (*p*). But when the 9 *G. 4, c. 14*, was coming into operation on the 1st January, 1829, after which parol evidence of a promise to take the case out of the statute of limitations would be inadmissible, the Court tried the cause in December, out of its turn, and the plaintiff obtained a verdict, when he

(*h*) Chit. Sum. Prac. 179.

(*i*) *Fourdrinier v. Bradbury*, 3 B. & Ald. 328.

(*k*) *Greatwood v. Sims*, 2 Chit. Rep. 269; *De Rouffignv v. Peale*, 3 Taunt. 484.

(*l*) *Gwillt v. Crawley*, 8 Bing. 144; and see *Breach v. Casterton*, 7 Id. 224.

(*m*) *Blackhurst v. Bulmer*, 1 D. & R. 553, 5 B. & Ald. 907, S. C.

(*n*) *Goldschmidt v. Marryat*, 1 Camp. 559. See also *Res v. Houlditch*, 1 Stark. 63.

(*o*) *Iszard v. Milner*, 4 C. & P. 285.

(*p*) *Dudley v. Robins*, 3 C. & P. 26.

must otherwise have failed (q). In undefended causes, after the jury have been sworn, and the cause has been in part heard, and it has been discovered, pending the trial, that a material witness, who had recently been subpoenaed, is unexpectedly absent, Lord Tenterden has frequently, as a favour, suspended the continuance of the trial, until the witness has been fetched; and has taken other causes in the mean time, or has discharged the jury, so as to enable the plaintiff to try the cause on another day (r).

The Judge is not bound to try a cause founded on a wager, as on the event of a boxing-match, dog-fight, cricket-match, &c. (s).

If the cause be coming on, and you are not prepared to proceed in the trial, you may withdraw the record. This however can be done only by the party who entered the cause with the marshal; by the plaintiff in ordinary cases, or by the defendant if he have carried down the record by proviso, and entered it for trial. The record however cannot be withdrawn by counsel, who is merely retained in the cause, but to whom a brief has not been delivered (t). And where the record is thus withdrawn, and afterwards re-entered and tried, and the plaintiff has a verdict, the Master will not allow in taxation the costs of the second entry and attendance of witnesses, &c. thereupon (u).

If the record be not withdrawn, the attornies for the plaintiff and defendant should take care to be in Court, to have their counsel in Court, and their evidence and witnesses in readiness, when the cause is called on; *vide supra*; otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited, or the Court will order the cause to be struck out of the list, and the plaintiff will have to pay the costs of the day: or if the defendant's attorney and witness be not in attendance, the defendant will lose the benefit of his defence, and the plaintiff will most probably obtain a verdict. The counsel for the plaintiff has a right, upon his cause being called on, to request the swearing of the jury to be suspended until a necessary witness has been called on for his *subpoena*, and it has been ascertained whether he be present; and upon finding he is absent, the counsel may then withdraw the record and thus avoid a nonsuit, which, if the jury had been first sworn, he must have submitted to (x).

When the cause is called on, the record or an abstract of it made out by the Judge's marshal, is handed to the Judge, in order that he may know the issues the jury have to try.

*Jury, how called and sworn.*] By stat. 6 G. 4, c. 50, s. 26, the under-

(q) Chit. Sum. Prac. 180.

(r) Chit. Sum. Prac. 180.

(s) *Thornton v. Thackray*, 2 Y. & J. 165; *Egerton v. Furzman*, R. & M. C. N. P. 213, 1 C. & P. 613, S. C.; *Kennedy v. Gad*, 3 C. & P. 376, 1 M. & M. 225, S.

C.; *Walpole v. Saunders*, 7 D. & R. 130.

(t) *Ahitbol v. Benedetto*, 2 Camp. 487.

3 Taunt. 225, S. C.

(u) *Gadd v. Bennett*, MS. E. 1820.

(x) *Hopper v. Smith*, 1 M. & M. 115.



sheriff is to cause the name, addition, and place of abode of each person summoned and impanelled to serve on the jury, to be written on distinct pieces of parchment or card, and to be given to the associate, prothonotary, or secondary, to be put into a box to be provided for that purpose. And, by the same section, when the cause is called on, such associate, &c. shall draw out twelve of these pieces of parchment or card, one after another; and if any of the jurors, whose names are so drawn, do not appear, or if challenged, and the challenge be allowed, then other names shall be drawn, until twelve jurors shall appear, and, after all causes of challenge allowed, shall remain as fair and indifferent; and these twelve persons being sworn, and their names being marked in the panel, shall be the jury to try the cause; and their names shall be kept apart until they return their verdict, and shall then be returned to the box. But where a jury are once drawn, they may afterwards (if not objected to) be sworn in other causes, without being re-drawn; and if any be challenged or withdrawn by consent, the Court may order them to be set aside, and other names drawn in their stead. (*Id.*)

Where a view, however, has been had, the jurors who took it are to be called first, and as many of them as appear shall be sworn, and then names shall be drawn as above directed, in order to make up the remainder of the jury. (6 G. 4, c. 50, s. 24). And where two sets of jurors are returned, as mentioned *ante*, 260, and a view has been had in any case, the Judge shall order the trial to be had during the attendance of that set of jurors, in which the viewers, or the major part of them, are included. (*Id.* 22).

*Challenges.*] When the jury come to the book to be sworn, either party may challenge them. As to the cause of challenge, the mode of challenging, and the manner in which the challenge is tried and decided, *see post*, 292 to 297.

*Tales.*] If a sufficient number of jurors do not appear, or if, after challenge, a sufficient number do not remain, to make a jury, then, upon request of the plaintiff or defendant, the justices may command the sheriff to name and appoint so many of such other able men of the said county, then present, as shall make up a full jury; and the sheriff shall thereupon return such men, duly qualified, as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel. (6 G. 4, c. 50, s. 37). But if neither of the parties will pray a tales, the cause must go off for want of jurors (*y*).

A tales, however, is seldom necessary, except in special-jury causes; and then the number of jurors wanted must be made up by drawing names of common jurors out of the box, if a sufficient number of common jurors can be found; (6 G. 4, c. 50, s. 37); if not, the tales, if

prayed, must be made up in the manner above directed. It is to be observed, however, that in a special jury cause the plaintiff's counsel cannot have a tale without the consent of the defendant's counsel (z).

*Case stated, and evidence.*] It is a general rule, that the party who has to maintain the affirmative of the issue, must begin to give the evidence. Where there are special pleadings, or where a special defence is not intended to be given in evidence under the general issue, it may perhaps be more accurate to say that the party who has added the *similiter* shall begin. If both parties, however, have added the *similiter* to different sets of pleadings in the same cause, then the plaintiff shall begin (a). If the general issue be not pleaded, and the affirmative of the issue lies on the defendant, he is to begin (b). Thus, he is to begin in an action for a libel, where a justification is pleaded, without the general issue (c). So in an action for trespass *quare clausum fregit*, or for injuring personal property, or for an assault, &c. where there is a plea of justification only, the defendant may begin (d). Where, to a declaration in trespass, the defendant pleaded, as to coming with force and arms, and whatever else was against the peace of our lord the King, not guilty, and, as to the residue of the trespasses, a right of way, *Bayley, J.*, held that the defendant should begin, because the first part of the plea was not a general issue, and did not throw the necessity of any proof upon the plaintiff (e). Where a special defence is intended to be given in evidence under the general issue, that party shall begin who would have been entitled to do so if the defence had been specially pleaded. Thus, in ejectment, where the lessor of the plaintiff claims by a title, which is admitted by the defendant, but the defendant claims under a title destructive of that of the lessor of the plaintiff,—as where the lessor of the plaintiff claims as heir-at-law, and the defendant as devisee under a will which is impeached by the plaintiff (f); or where the lessor of the plaintiff claims under a will, and the defendant under a subsequent codicil which is impeached by the plaintiff (g), the defendant is entitled to begin (h). But where, in ejectment, each party claimed as heir-at-law, and the real question was as to the legitimacy of the defendant, who was clearly heir, if legitimate, and proposed to admit that, unless he were legitimate, the lessor of the plaintiff was the heir-at-law; it was holden, that this admission did not give him the right of beginning (i). In *replevin*, where the defendant avowed for rent, the plaintiff pleaded in bar an agreement to set off another sum

(z) *British Museum v. White*, 3 C. & P. 289.

(a) *Jackson v. Hesketth*, 2 Stark. Rep. 521.

(b) *Per Lord Tenterden, Cotton v. James*, 1 M. & M. 275.

(c) *Cooper v. Wakley*, 1 M. & M. 248, 3 C. & P. 474, S. C.

(d) *Cotton v. James*, 1 M. & M. 273, 3 C. & P. 505, S. C.; *Fish v. Travers*, 3 C. & P. 578; *Bedell v. Russell*, 1 R. & M.

C. N. P. 293.

(e) *Hodges v. Holder*, 3 Camp. 366; *Jackson v. Hesketth*, 2 Stark. 518.

(f) *Goodtitle v. Braham*, 4 T. R. 497; *Jackson v. Hesketth*, 2 Stark. Rep. 519.

(g) *Doe v. Corbett*, 3 Camp. 368.

(h) *See Robey v. Howard*, 2 Stark. 555.

(i) *Doe d. Warren v. Bray*, 1 M. & M. 166.

against the rent, and issue was taken on that plea, the plaintiff was held entitled to begin, the affirmative being on him (*k*). So where, in replevin, there was a cognizance for rent in arrear, to which there were two pleas, the one stating that a certain agreement had been entered into between the landlord and tenant, and the tenant was subsequently induced by the landlord to enter into another agreement, which second agreement was the demise in the cognizance mentioned, and that this latter agreement had been abandoned by mutual consent, before any rent became due, and the other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud; and there was a replication to the first plea, denying the abandonment, and to the other, denying the fraud; it was ~~held~~ <sup>held</sup> that, on these pleadings, the plaintiff had the right to begin (*l*). On a plea in abatement, the defendant's counsel is in general entitled to begin (*m*), and in general the *onus* of proving damages does not give the plaintiff's counsel a right to begin (*n*). It should seem, that, if the defendant on the trial will admit the plaintiff's case, he will be entitled to begin, but then he must admit the whole case (*o*).

The junior counsel for the party who has to begin, opens the pleadings, that is, states shortly the substance of them to the jury, and the points upon which issue has been joined. The senior counsel on the same side then states the facts and circumstances of the case to the jury, the substance of the evidence he has to adduce, and its effect in proving the case stated, and he remarks upon any point of law, on which, together with the matters of fact, the jury will have to found their verdict (*p*). The Court will not, in general, allow counsel to prove any other case than that stated to the jury; therefore, where counsel, in his address to the jury, confined himself to a case upon a bill of exchange, the Court would not afterwards allow him to prove a case under the money counts (*q*). He also states the matter of defence, if it appear upon the record, or from a notice of set-off, or the like, and the evidence by which he can disprove it (*r*). The plaintiff's counsel, when he begins, is at liberty, whether the defence be known or not, either at once to enter into the whole of his case, or to make out a *prima facie* case only, and to reserve his answer to the defendant's case for the reply, but he cannot answer part of the defendant's case in his opening and part in the reply (*s*). Counsel are privileged in commenting fairly and *bona fide* on the circumstances of the case, and in making observations not only on the parties concerned,

(*k*) *Curtis v. Wheeler*, 4 C. & P. 166.

(*l*) *Williams v. Thomas*, 4 C. & P. 234.

(*m*) *Fowler v. Coster*, 1 M. & M. 241, 3 C. & P. 463, S. C.

(*n*) *Anon.* 2 Stark. Ev. 2; *Bedell v. Russell*, R. & M. 203; but see *Robey v. Howard*, 2 Stark. 555; *Stangfield v. Levy*, 3 Id. 8.

(*o*) *Doe v. Tucker*, 1 M. & M. 536.

(*p*) See *Plunkett v. Cobbett*, 5 Esp. 136, 2 Selw. N.P. 142, S. C.

(*q*) *Paterson v. Zachariah*, 1 Stark. Rep. 72; but see *Murray v. Butler*, 3 Esp. 105; *Penson v. Lee*, 2 B. & P. 331, 333; *semb. contrd.*

(*r*) See *Delauney v. Mitchell*, 1 Stark. 439; *Rees v. Smith*, 2 Id. 31.

(*s*) *Bruene v. Murray*, R. & M. 254; *Sylvester v. Hall*, Id. 255. n.; 1 Stark. Ev. 303; *Rosc. 132*, overruling *Rees v. Smith*, 2 Stark. Rep. 31, R. & M. 255, n. S. C.

but also on the conduct of their agents in bringing the cause into Court. Therefore it has been holden that no action would lie against a barrister, for saying, in the course of his address to the jury, that the plaintiff's attorney was "a fraudulent and wicked attorney," the words having reference to the attorney's having brought the action for a sum of money, to which he knew that his client was not entitled (t).

After the senior counsel has thus stated the case, the witnesses to prove it are next called and examined in their order; the first is examined by the counsel next in rank to the senior; the second by the junior, if there be three counsel engaged on that side; the third by the senior: each barrister examining a witness, in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness (u). Where there are several defendants, who appear by separate attorneys and have separate counsel, if their defences be different or distinct from each other, the counsel of each has a right to address the jury, and examine witnesses; but if they rely on the same ground of defence, only one counsel can be heard to address the jury, and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly (x). So in ejectment, if a landlord and tenant defend by different attorneys and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord, the Judge, at the trial, will only allow one counsel to address the jury for the defence; but the party's counsel, who does not address the jury, will be at liberty to cross-examine, and also to call witnesses (y). And where two defendants appear and plead by the same attorney, but, at the trial, counsel appear for one defendant only, and the other defendant appears in person, the counsel only will be allowed to address the jury; but the defendant, who has no counsel, may cross-examine the witnesses (z).

Before the jury are sworn, the counsel for the plaintiff may, on the case being called on, have a witness called on his *subpoena* (a).

In the direct examination of a witness, he must not, in general, be asked leading questions (b). Yet where a witness swears to a certain fact, and another is called for the purpose of contradicting him, the latter may be asked directly whether that fact ever took place (c). So, if the witness appear evidently to be hostile to the party who has

(t) *Hodgson v. Scarlett*, 1 B. & Ald. 232.

(u) *Doe v. Roe*, 2 Camp. 280.

(x) *Chippendale v. Masson*, 4 Camp. 174; and see *King v. Williamson*, 3 Stark, 162, 1 D. & R. N.P.C. 35, S. C. *Mussey v. Goyder*, 4 C. & P. 162; *Doe d. Fox v. Brymley*, 6 D. & R. 292.

(y) *Doe d. Hoare v. Tindale*, 2 G. & P. 565, 1 M. & M. 314, S. C.

(z) *Perring v. Tucker*, 4 C. & P. 70, 1 M. & M. 391, S. C.; and see *Massey v. Goyder*, 4 C. & P. 162, n. (a).

(a) *Hopper v. Smith*, 1 M. & M. 115.

(b) *Peake*, Ev. 196; *Rosc. 94*; and see *Nicholls v. Dowding*, 1 Stark. 81.

(c) *Courteen v. Touse*, 1 Camp. 43.

called him, the counsel may put leading questions to him, in the same manner as in a cross-examination, having first obtained the permission of the Court to do so (d).

If it be intended to object to any witness, on the ground of incompetency, it is better perhaps to do so before he is examined in chief; and, if he can be examined as to it, to examine him on the *voir dire*. Formerly, the objection must have been made before the witness was sworn in chief; but it may now be made at any time during the trial (e). After the witness has left the box, there is an end of all questions as to his competency (f). If the supposed incompetency arise from the witness having been convicted of any crime, you must prove the record of the conviction (g). As to cross-examining the witness himself upon the subject of any offence imputed to him, there seems to be a difference of opinion among the Judges upon this point: some hold that you cannot ask a question of a witness, the answer to which in the affirmative would subject him to punishment; others that you may ask the question, but that the witness is not bound to answer it; and others, it is believed, include in the rule, not only questions, the answers to which might subject the witness to punishment, but also all those where the witness by his answer might be obliged to allege his own infamy or turpitude, although they might not subject him to punishment. In *Rex v. Holding & Wade*, O. B. June, 1821, *Bayley, J.*, held that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer it; all other questions, for the purpose of impeaching a witness's character, may not only be put, but must be answered. If the witness be examined as to the offence imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses or offer other evidence to contradict him (h). Or if general evidence be given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinions, if he think it prudent to do so; or he may call witnesses to speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination (i).

If the supposed incompetency arise from interest, the witness may be examined respecting it (k). If he acknowledge that he was once interested, he will be allowed afterwards to prove that his interest has determined, without producing the instrument by which his interest was so determined (l); but if his interest have been proved by

(d) *Peake, Ev. 198; Clarke v. Saffery, R. & M. C.N.P. 128.* See more particularly upon this subject, *Arch. Sum. C. L. 110, 111; Rosc. 94.*

(e) *Stone v. Blackburn, 1 Esp. 37; Peake, Ev. 195; Turner v. Pearse, 1 T. R. 717.*

(f) *Beeching v. Gower, Holt, C. N. P. 314.*

(g) *Bul. N. P. 292; Rex v. Inhabitants of Bastell Carcinton, 8 East, 77,*

*Arch. Pl. & Ev. 389.* See *Cooke v. Maxwell, 2 Stark. 183; Sharp v. Scoging, Holt, C.N.P. 541.*

(h) *Rex v. Watson, 2 Stark. 149, et seq.; Harris v. Tippet, 2 Camp. 637.*

(i) See *Arch. Sum. C. L. 102.*

(k) See 1 *Esp. 409; 46 G. 3, c. 37, s. 1.*

(l) *Peake, Ev. 196; Butchers' Company v. Jones, 1 Esp. 160, 164; and see Howell v. Lock, 2 Camp. 14; Butler v. Carver, 2 Stark. 433.*

other witnesses, the instrument which has determined it must be produced. And in all cases where a release is necessary, to give competency to a witness, it must be produced and proved (m).

A witness can be allowed only to speak of facts within his own knowledge and recollection (n). He cannot therefore be permitted to read his evidence (o); but he will be allowed to refresh his memory from any book or paper, if he can afterwards swear to the fact from his recollection (p), and this though he himself did not make the entry (q). If he know the fact, however, only from seeing it in the book or paper, the original book or paper must be given in evidence and proved by other means (r). But where a witness, on seeing his initials affixed to an entry of payment, said "I have no recollection that I received the money; I know nothing but by the book; but, seeing my initials, I have no doubt that I received the money," this was held sufficient evidence (s). Depositions made by an old witness have been allowed to be read to him, for the purpose of refreshing his memory as to dates, &c. (t). He will not be allowed to refresh his memory from a copy of a paper made by himself six months after he wrote the original, though the original is proved to be so covered with figures as to be unintelligible (u). Where a paper is put into the hands of a witness to refresh his memory, the opposite counsel has a right to inspect it without being forced to read it in evidence (x).

There is another exception, also, to the general rule lastly above mentioned, namely, that in questions of science, a witness may be examined as to his *opinion*, upon facts previously stated; thus, although a physician may have never seen the patient, he may swear to his opinion of the disease, &c., upon facts stated by others (y).

The plaintiff or defendant shall not be allowed to call witnesses to disprove what his own witnesses have already sworn (z); unless, perhaps, where what the witness swears is palpably false, and it would be a great injustice to allow the party's case to be sacrificed for that reason (a). But the opposite party may call witnesses for that purpose; or may give in evidence what the same witness swore at another time about the same matter, in order to prove a variance, and thereby detract from his credit (b). So, a letter written by the same witness contradictory to his present testimony (c), and *a fortiori* de-

(m) See Arch. Pl. & Ev. 389 to 396; Rosc. 93.

(n) Arch. Pl. & Ev. 386.

(o) 5 St. Tr. 455.

(p) *Doe v. Perkins*, 3 T. R. 749.

(q) *Henry v. Lee*, 2 Chit. Rep. 124; *Burrough v. Martin*, 2 Camp. 112.

(r) *Doe v. Perkins*, 3 T. R. 749.

(s) *Maugham v. Hubbard*, 8 B. & Cress. 14, 2 M. & R. 5, S. C.

(t) *Vaughan v. Martin*, 1 Esp. 440.

(u) *Jones v. Stroud*, 2 C. & P. 196.

(z) *Sinclair v. Stevenson*, 1 C. & P. 582, 2 Bligh. 514, S. C.; *Rex v. Rams-*

*den*, 2 C. & P. 603.

(y) Arch. Pl. & Ev. 380; Rosc. 98; Peake, Ev. 208; and see the late case of *Richards v. Murdoch*, 10 B. & Cress. 527.

(c) 5 St. Tr. 2, 764, 792; *Ewer v. Ambrose*, 3 B. & Cress. 749; 5 D. & R. 629; S. C.

(a) See *Alexander v. Gibson*, 2 Camp. 556; *Richardson v. Allan*, 2 Stark. 334; 2 Chit. 657, S. C.

(b) 2 Hawk. c. 46, s. 11; *Lowe v. Joffe*, 1 W. Bl. 365; *Richardson v. Allan*, 2 Stark. 334; 2 Chit. 657, S. C.

(c) *De Saillu v. Morran*, 2 Esp. 691.

positions of the same witness, taken *de bene esse*, may be given in evidence for the same purpose. Where a party tenders evidence *prima facie* admissible, the other party will not be allowed to interpose with evidence for the purpose of excluding it; but it should be received and expunged if afterwards shewn not to be properly receivable (d).

It may sometimes be advisable to examine witnesses separately, and out of the hearing of each other, with a view to obviate the danger of a connected story among them, and to prevent the influence which the account given by one may have upon another (e). It is then usual to order the witnesses out of Court, with notice that they will not be examined if they remain (f). But where a witness remains in Court, after an order for the witnesses to withdraw, it is discretionary in the Judge to allow him to be examined or not, subject to observation on his conduct, in disobeying the order (g). In the Exchequer he is peremptorily excluded from being examined if he remain in Court after an order to quit it (h). If the attorney in the cause is a witness, he will be suffered to remain, his assistance being absolutely necessary to the proper conduct of the cause (i).

When the direct examination is finished, the witness may be cross-examined by the counsel for the opposite party. But if the party calling a witness, do not think proper to examine him after he is called and sworn, he may nevertheless be cross-examined by the counsel for the opposite party (k). In cross-examining a witness, the counsel may ask him leading questions, or indeed any questions at all relevant to the cause (l). He may even be cross-examined as to a fact irrelevant to the issue, for the purpose of discrediting his testimony by what he himself may state in evidence (m); but otherwise, where it is done with the intention of calling other witnesses to disprove what he says (n).

If any new fact arise out of the cross-examination, the witness may be re-examined as to it by the counsel who first examined him. In the same manner he may be re-examined, when necessary, in order to explain any part of his cross-examination (o).

The plaintiff must take care to shape his evidence in the most favourable manner he can, from the first, and adapt it to the proof of the matter in issue; for, where, in an action for an assault, with but one count in the declaration, the plaintiff, having proved one assault, wished to abandon that and prove another, the Court would not allow

(d) *Jones v. Fort*, 1 M. & M. 196.

(e) Phil. Ev. 4 ed. 282; Rosc. 93, 94.

(f) *Res v. Colley*, 1 M. & M. 329.

(g) *Parker v. M. William*, 4 M. & P. 490, 6 Bing. 683, S.C.

(h) *Attorney-General v. Bulpit*, 9 Price, 4.

(i) *Pomeroy v. Baddley*, R. & M. 430; but see *Res v. Webb*, 3 Stark. Ev. 1733.

(k) *Phillips v. Kamer*, 1 Esp. 357; *Res v. Brooke*, 2 Stark. 472.

(l) See Arch. Sum. C. L. 112; Rosc. 94; and see *Dickinson v. Shee*, 4 Esp. 68.

(m) *Harris v. Tippet*, 2 Camp. 637.

(n) *Spenceley v. De Willott*, 7 East, 108. See, as to the cross-examination of a witness, generally, Arch. Sum. C. L. 111; Rosc. 95.

(o) See, as to the re-examination of a witness, Arch. Sum. C. L. 118.

him to do so (*p*). Nor will the Court allow counsel to prove any other case than that stated to the jury; therefore, where counsel, in his address to the jury, confined himself to a case upon a bill of exchange, the Court would not afterwards allow him to prove a case under the money counts (*q*). It must also be remarked, that after the plaintiff's case has been closed, the Court will not permit him to remedy a defect in his evidence, by calling back a witness or otherwise, unless such defect arose from inadvertency on the part of his counsel (*r*). But the Judge will allow plaintiff's counsel, after he has closed his case, to recall a witness, for the purpose of obviating objections which are beside the justice of the case, and little more than mere matter of form (*s*). If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection, the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited (*t*).

*The defence and evidence.*] When the party who opened the cause has gone through his evidence, examined all his witnesses, and closed his case, the senior counsel of the opposite party then states to the jury the matter of his client's defence, the evidence (if any) which he will adduce in support of it, and remarks on the case and evidence of the other party. The witnesses for the defence (if any) are then examined and cross-examined in the manner already mentioned: and here the defence closes.

*The reply.*] If the counsel for the defence have examined any witnesses, or adduced any evidence in support of it, or even if he have stated any new fact to the jury, and have not given evidence in proof of it (*u*), the opposite party is entitled to the reply, as of right; otherwise not, unless when the king is a party, and the privilege of replying is claimed by the attorney-general, in right of his office (*x*). But where the counsel for the defendant opens facts to the jury as to which he calls no witnesses to prove, it is in the discretion of the Judge to permit the plaintiff's counsel to reply (*y*). Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entire new case, which again the plaintiff controverts by evidence, the defendant's reply in such case is confined to the new case set up by him, for, upon that relied upon by the plaintiff, his counsel has already commented in the opening of the defendant's case, and the plaintiff is entitled to the general reply (*z*). Where the defendant

(*p*) *Stante v. Pricket*, 1 Camp. 478.

(*q*) *Paterson v. Zachariah*, 1 Stark. 72; but see *Murray v. Butler*, 3 Esp. 105; *Penson v. Lee*, 2 B. & P. 331 to 333, *semb. contra*.

(*r*) *Aldred v. Halliwell*, 1 Stark. 117; *Giles v. Powell*, 2 C. & P. 259; *Soulby v. Pickford*, 2 M. & P. 545.

(*s*) *Giles v. Powell*, 2 C. & P. 259.

(*t*) *Fairlie v. Denton*, 3 C. & P. 103.

(*u*) *Res v. Bignold*, 4 D. & R. 70.

(*v*) *Res v. Earl Abington*, Peake, N. P. C. 236; 1 Esp. 226, S. C.; *Res v. Marsden*, 1 M. & M. 439; *Res v. Bell*, 1 Id. 440, *Rowe v. Brenton*, 3 M. & R. 304.

(*y*) *Crerar v. Sodo*, 1 M. & M. 85; 3 C. & P. 10, S. C.

(*z*) *Stark. Evid.* 384; *Meagor v. Simmons*, 1 M. & M. 121, 3 C. & P. 76, S. C.; *Rosc.* 133.



proves a payment to the plaintiff, by shewing the particulars of demand delivered under a Judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to a reply (a). If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observe upon the general state of the book, and refer to other parts of it, such observations do not give the plaintiff's counsel the right of reply (b). In the Court of Common Pleas, the defendant's merely giving evidence of payment of money into Court, under a rule, will not entitle the plaintiff to the reply (c). Before he replies, the plaintiff's counsel may, if he think proper, produce evidence to disprove any part of the defence set up by the defendant; in which case the defendant's counsel has the privilege of again addressing the jury, but his observations must be confined to the evidence only given by the plaintiff. The evidence of the plaintiff is then taken in a book, and the case is then taken in the original case (d). Where there are cross demands between the plaintiff and the defendant, the plaintiff need not in the first instance prove the whole of his account, but need only prove the balance which he claims; and if the defendant proves his set-off to a larger amount, the plaintiff may then prove other parts of his account to exclude the defendant's set-off (e). The reply then closes the case on both sides.

*The summing up.*] When the case is closed on both sides, if the plaintiff do not elect, or have not previously elected, to be nonsuit, the Judge then sums up the evidence (as it is termed); that is, he states to the jury the matters really in dispute between the parties; he recapitulates from his notes the evidence given on both sides, and makes his remarks on it when necessary; if any question of law be mixed up with the questions of fact, he states to them the principles of law upon which the case must be decided, and the manner in which they must be applied to, and their effect upon it; and lastly, he states to them, if necessary, the form in which they are to give their verdict. As all this, however, is intended merely as an assistance to the jury, the Judge, in his discretion, will omit any part of it he may think unnecessary; thus, where the evidence is short, and there is no complexity in it, and where but a short interval of time has elapsed between the giving of it and the closing of the case, so that it is impossible the jury can have forgotten any part of it, the Judge will omit the recapitulation of the evidence. So, where the case is very clear, both in point of law and fact, and it is apparent that the jury have already determined on a verdict according with the justice and merits of the case, the Judge will omit the summing up altogether.

*Amendments of variances at the trial.*] By the 9 G. 4, c. 15, every

(a) *Rymer v. Cook*, 1 M. & M. 86, n.

(b) *Pullen v. White*, 3 C. & P. 434.

(c) *Skarratt v. Vaughan*, 2 Taunt.

267.

(d) See *Rees v. Hilditch*, 5 C. & P. 299.

(e) *Williams v. Davis*, 1 Dowl. P. C. 647, 1 C. & M. 464, S. C.; see *vide*

*Broune v. Murray*, R & M. 254; *Rees v. Smith*, 2 Stark. 31.

court of record holding plea in civil actions, and any Judge sitting at *Nisi Prius*, (if they think fit), may cause the record, when a *variance* appears between any *matter in writing or in print* produced in evidence, and the *recital or setting forth thereof upon the record*, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party, as such Judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly. This statute, being a remedial act, always receives a liberal construction (*f*); but it extends only to variances between matters in *writing or in print* produced in evidence and the record, and to remedy this, and the great expense, delay, and failure of justice which frequently took place by reason of variances in *other matters*, the 3 & 4 W. 4, c. 42, s. 23, was passed, by which it is enacted, "That it shall be lawful for any Court of record, holding plea in civil actions, and any Judge sitting at *Nisi Prius*, (if such Court or Judge shall see fit so to do), to cause the record, writ, or document on which any trial may be pending before any such Court or Judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any *variance* shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any *contract, custom, prescription, name, or other matter*, in any particular or particulars in the judgment of such Court or Judge *not material to the merits* of the case, and by which the *opposite party cannot have been prejudiced* in the conduct of his action, prosecution, or defence,

(*f*) And although the variance be in an averment referring to a written instrument, the Court or Judge may still allow an amendment, under this act of 9 G. 4, although the instrument itself be not set out. And where, in an action for not obeying a subpoena, the declaration stated that the plaintiff caused to be left with the defendant a copy of the writ of subpoena, it was considered that the Judge might allow an amendment in the following words:—"A copy of so much of the said writ as related to the said defendant." (*Masterton v. Judson*, 8 Bingh. 224; and see *Lamey v. Bishop*, 1 N. & M. 332). The Judge, however, would not allow an amendment, under that act, of variances substantially altering the nature of the averment. Thus, where the declaration stated that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy," &c., it was held, that the production of a rule

to discontinue did not prove the averment; and Lord Tenterden refused to allow an amendment under that act. (*Webb v. Hill*, 1 M. & M. 253, 3 C. & P. 485, S. C.) Where, in replevin, the defendant avowed for rent in arrear, and, on production of the lease, it varied from the terms of the tenancy stated in the avowry, *Park, J.* refused to permit an amendment under this statute, observing, that it only applied to cases where some particular written instrument was professed to be set out or recited. (*Hyder v. Malbon*, 3 C. & P. 594). So, where certain words had been added to an acceptance of a bill, obviously after the bill was accepted, and the declaration stated the acceptance, with the addition of those words, Lord Tenterden refused an amendment, saying, that it was not one of those cases where there had been a verbal mistake in setting out some written document. (*Jelf v. Oriel*, 4 C. & P. 22; and see *Rutherford v. Evans*, Id. 79).

to be <sup>\*</sup>*forthwith amended* by some officer of the Court or otherwise, both in the part of the pleading where such variance occurs, and in every other part of the pleadings, which it may become necessary to amend, on such terms as to *payment of costs* to the other party, or *postponing the trial* to be had before the same or another jury, or both payment of costs and postponement, as such Court or Judge shall think reasonable. And in case such variance shall be in some particular or particulars in the judgment of such Court or Judge *not material to the merits* of the case, but *such as that the opposite party may have been prejudiced* thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended upon payment of costs to the other party, and *withdrawing the record or postponing the trial* as aforesaid, as such Court or Judge shall think reasonable. And after any such amendment *the trial shall proceed*, (in case the same shall be proceeded with), *in the same manner* in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared. And in case such trial shall be had at *Nisi Prius* or by virtue of such writ as aforesaid, *the order for the amendment shall be indorsed on the postea or the writ*, (as the case may be), and returned together with the record or writ, and thereupon such papers, rolls, and other records of the Court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly. And in case the trial shall be had in any Court of record, then the *order for amendment shall be entered on the roll* or other document upon which the trial shall be had; provided that it shall be lawful for any party who is *dissatisfied* with the decision of such Judge at *Nisi Prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the Court from which such record or writ issued for a *new trial* upon that ground, and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet."

The 24th section of the 3 & 4 W. 4, c. 42, provides "that the Court or Judge shall and may, if they or he think fit, in all such cases of variance, *instead of causing the record or document to be amended*, as aforesaid, *direct the jury to find the fact or facts according to the evidence*, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said Court or the Court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have *prejudiced the opposite party* in the conduct of the action or defence, *give judgment according to the very right and justice of the case*."

Where a judgment was stated in the record as of one Court, and it appeared by the production of an examined copy to have been ob-

tained in another, the record was allowed to be amended under the above statute of 9 G. 4, c. 15 (g). Where the declaration against the acceptor of a bill mis-stated the date of the bill, *Park, J.*, allowed an amendment, under the same act; without costs (h). And where in an action on a bill, by the indorsee against the indorser, the bill was stated to have been drawn payable to the drawer's order, and by him indorsed, to A. B., whereas it appeared in evidence to have been drawn in favour of A. B., the Judge allowed an amendment (i). The decision of the Judge in allowing the amendment cannot be controverted by the Court (k).

*Withdrawing a juror.*] During the trial, after the jury are sworn, the parties frequently agree to withdraw a juror. This is usually done at the recommendation of the Judge, in cases where it is doubtful whether the action will lie, or where the Judge intimates an opinion, that, under the peculiar circumstances of the case, the action should proceed no further. When a juror is withdrawn, each party pays his own costs (l). The withdrawing a juror by consent of the parties, is, it seems, no bar to a future action for the same cause (m). Discharging a jury by consent does not terminate the suit, and in this respect is like the withdrawing a juror (n).

*Plea puis darrein continuance.*] At any time before the jury actually give their verdict, the defendant may plead, in abatement or bar of the action, any matter of defence arising since the last continuance, that is, since the return of the *venire*. This is termed a plea *puis darrein continuance*; it shall be treated of more particularly in the next section. When this plea is pleaded and received, it is entered on the back of the record of *Nisi Prius*, and certified to the Court above; and all further proceedings in the cause, at the assizes or *Nisi Prius*, are thereby suspended.

*Bill of exceptions.*] If, during the trial, you wish to object to the opinion and direction of the Judge, either as to the competency of a witness, the admissibility of evidence, or for overruling a challenge, or refusing a demurrer to evidence, you may tender a bill of exceptions; and this is afterwards determined in a court of error. (o).

*Demurrer to evidence.*] When you think that the facts proved do not maintain the issue, this being in itself a point of law, you may, if you wish, withdraw it from the consideration of the jury, by de-

(g) *Briant v. Eicke*, 1 M. & M. 359.

(h) *Bentzing v. Scott*, 4 C. & P. 79; Rosc. 42.

(i) *Parker v. Ade*, 1 Dowl. P. C. 643, 1 C. & M. 429, *nom. Parks v. Edge*, S. C.

(k) *Id.*

(l) *Stodhart v. Johnson*, 3 T. R. 657.

(m) *Sanders v. Nestor*, R. & M. 402; *Everett v. Youells*, 3 B. & Adol. 349.

See form of *postea* and judgment, where a juror is withdrawn, Chit. Forms, 165.

(n) *Everett v. Youells*, 3 B. & Adol. 349.

(o) See this subject particularly treated of, *post*, sect. 5; and see form of bill of exceptions, Chit. Forms, 171.

murring to the evidence; which demurrer will afterwards be determined by the Court in which the action was commenced (*p*).

*Nonsuit.*] If the plaintiff find that his evidence is not sufficient to maintain his case, he may elect to be nonsuit, in order that he may have an opportunity of bringing another action, either in another shape, or when better prepared with evidence. This is done usually after the plaintiff has closed his evidence, or after the defendant's case is closed and before the Judge has summed up; but it may be done at any time before the jury have delivered their verdict (*q*).

*Verdict.*] If no plea *puis darrein continuance* be put in and received, and if there be no demurrer to evidence, or if there be no nonsuit, the jury, after the evidence is given and the Judge has summed it up, proceed to consider of their verdict. After the evidence is given, and the case closed on both sides, the jury must be kept together, without meat, drink, or fire, (candle-light only excepted), until they have delivered their verdict, unless otherwise ordered by the Judge. Also, they must not be allowed to speak with any person whatever, until they have agreed upon their verdict; between which time, and the time of delivering their verdict, they may speak with the bailiff who keeps them, but with no other person. And before the jury retire, the bailiff is sworn in open Court to keep them thus. If they eat or drink at their own expense, or at the expense of either of the parties, they subject themselves to be fined; and if at the expense of the party for whom they afterwards give their verdict, it also avoids the verdict. Where, however, a trial was not concluded on the first day, but the Court adjourned to the day following, and in the meantime the jury separated and went to their respective homes, without the assent or knowledge of the defendant; still the Court held it to be no ground for granting a new trial, unless it could also be shewn that some improper attempt had been made to practise upon or tamper with the jury, whilst they were thus separated (*r*). If the jurors do not agree in their verdict at the assizes before the Judges are about to leave the town, the Judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart (*s*). If the jury determine their verdict by lots, the verdict shall be set aside and the jurors fined (*t*); but the verdict in such a case cannot be impeached upon the testimony of any of the jurors themselves; the fact must be substantiated by other evidence (*u*).

(*p*) See as to this subject, *post*, sect. 5; and see the form of the demurrer, Chit. Forms, 169; and of the joinder, *Id.* 170.

(*q*) See more particularly on this subject, *post*, sect. 6; and see the forms of *postea*, judgment, and execution upon a nonsuit, Chit. Forms, 165.

(*r*) *Rez v. Kinnear*, 2 B. & Ald. 462, 3 Price, 536, S. C. See *Rez v. Fowler*, 4 Id. 273, 2 Doug. 416, S. C.; Co. Lit. 227.

(*s*) 3 Bla. Com. 276; *Morris v. Da-*

*vies*, 3 C. & P. 427, and notes.

(*t*) *Fry v. Hordy*, T. Jon. 83; *Res v. Lord Fitzwater*, 2 Lev. 140; *Foster v. Hatden*, *Id.* 203; *Hale v. Coxe*, 1 Str. 642.

(*u*) *Vaise v. Delaval*, 1 T. R. 11; *Lau-rence v. Rowell*, Say. 100; *Owen v. Warburton*, 1 New Rep. 326; *Res v. Wooler*, 2 Stark. 111; and see *Res v. Woodfall*, 5 Bur. 2667; *Cogan v. Edden*, 1 Bur. 383, 2 Ld. Ken. 24, S. C.; *Clark v. Stevenson*, 2 W. Bl. 803; *Jackson v. Williamson*, 2 T. R. 281; *Hindle v.*

The jury either give their verdict without quitting the jury box, or, in cases of difficulty, or where there is a difference of opinion among them, they may withdraw to a room provided for the purpose, in order to deliberate on their verdict. .

When the jury withdraw, they may take with them letters patent, deeds under seal, and exemplifications of depositions in equity if the witnesses be dead; and, with the assent of the parties, they may take with them books, or writings not under seal (*v*). Or even if they take them without such leave or consent, that circumstance, however irregular, will not avoid the verdict (*y*). But the jury cannot take with them evidence which has not been shewn to the Court (*z*); and if the party, for whom the verdict is afterwards given, deliver such evidence to the jury after they have left the bar, it will avoid the verdict (*y*); but if delivered by the opposite party, or produced by one of the jurors, without having received it from the parties, it will not (*a*). Also, if the jury examine witnesses after they have left the bar, even to the same points to which the same witnesses were before examined in Court, it will avoid the verdict (*b*). But they may return into Court to hear evidence as to any matter of which they are in doubt (*c*), or to ask any question of the Court (*d*). And, after the jury have had the case summed up to them, and have retired, the Judge will not permit them to see a treatise on the law of the subject, even with the consent of the parties; they should state their difficulty to the Judge, and receive his direction as to the law (*e*).

When any irregularity of the above description, capable of avoiding the verdict, occurs, it must be stated upon the *postea* or made parcel of the record; otherwise it cannot be made the subject of a motion in arrest of judgment, or of a writ of error (*f*).

If one of the jury happen to be taken suddenly ill, so as to be incapable of remaining until the verdict is agreed on, the Court may discharge that jury, and charge another with the cause (*g*).

If the jury are likely to be absent any considerable time, another cause is called on, and another jury drawn and sworn, in the manner stated *ante*, 273, 274; and when the first jury return to deliver their verdict, or for any other purpose, the Court for a while suspends the proceedings in the second action. .

When the jury return to the bar, they are asked if they have agreed upon their verdict, and whether they find for the plaintiff or the defendant. The foreman of the jury, in the presence and hearing of the remainder of the jurors (*h*) then delivers the verdict, and it is recorded (*i*). This verdict is either general or special; general,

*Birch, Sheriff of Middlesex*, 8 Taunt. 26, 1 Moore, 455, S. C.

(*v*) *Vicary v. Farthing*, Cro. El. 411; *Rex v. Burdett*, 1 Ld. Raym. 148, 2 Salk. 645, S. C.

(*y*) Co. Lit. 227 b.

(*z*) 2 Ro. Abr. 686.

(*a*) *Graves v. Short*, Cro. El. 616.

(*b*) *Vicary v. Farthing*, Cro. El. 411, 412. See *Rex v. Fowler*, 4 B. & Ald. 273.

(*c*) 2 Ro. Abr. 676.

(*d*) 2 Hale, 296.

(*e*) *Burrows v. Unwin*, 3 C. & P. 310.

(*f*) *Graves v. Short*, Cro. El. 616.

(*g*) *Rex v. Edwards*, 4 Taunt. 309, 3 Camp. 207, S. C.

(*h*) See *Rex v. Wooller*, 2 Stark. 111; *Cogan v. Eaden*, 1 Bur. 383, 2 Ld. Ken. 24, S. C.

(*i*) See generally, as to the verdict, *post*, sect. 7.

when the jury find generally for the plaintiff and state the damages, or for the defendant; special, when they find the facts of the case specially, as proved. The verdict is also either public or privy. A public verdict is that which is given by the jury in open Court, whilst the Court are sitting. A privy verdict is given before one of the Judges of the Court, after the Court have risen; but it must be observed, that if the Judge *adjourn* the Court to his lodgings, and the jury there deliver their verdict, this will be a public and not a privy verdict (*k*). A privy verdict also must be confirmed by the jury in open Court, before it can be recorded; before which time the jury may vary from it if they think proper (*l*); but after a verdict is recorded, no alteration, however slight, can be made in it (*l*).

If the jury find a verdict manifestly against evidence, the Court may send them back to reconsider it, before it is recorded, but not afterwards (*n*): This, however, is very unusual.

It is said that a jury may ground their verdict on their own knowledge of the facts of the case (*o*). But this doctrine, although generally entertained, appears questionable. It seems to be contrary to these words in the jurors' oath, "and a true verdict give *according to the evidence*;" for, to say that the word "evidence," here, includes any thing which the jurors may know of their own knowledge of the subject, and which has not been disclosed to the Court, would be giving a construction to the word very different from its common and legal acceptance.

Formerly, if the jury gave a false verdict, the party injured by it might sue out and prosecute a writ of attain against them, either at common law, or on the stat. 11 H. 7, c. 24, at his election, for the purpose of reversing the judgment, and punishing the jury for their verdict (*p*); but not where the jury erred merely in point of law, if they found according to the Judge's direction (*q*). The practice of setting aside verdicts, and granting new trials, however, had so superseded the use of attaints, that there is no instance of one to be found in our books of reports later than in the time of Elizabeth (*r*); and it is now altogether abolished by stat. 6 G. 4, c. 50, s. 60. And in no case can the Court or Judge in any other manner fine or imprison or otherwise punish a jury for their verdict, however erroneous (*s*).

*Certificate of Judge for speedy execution.*] Formerly, if a verdict was obtained in vacation, the judgment and execution were in all cases delayed by reason of the intervals between the terms, until after the return of the *distringas* or *habeas corpora* in the next term, (*post*, 316); but now by the 1 W. 4, c. 7, s. 2, it is enacted "that in all actions brought in either of the said (superior) Courts, by what-

(*k*) 3 Bl. Com. 377, (*o*); and see *Dawson v. Howard*, 1 Ld. Raym. 129.

(*l*) Co. Lit. 227.

(*n*) 2 Hawk. c. 47, s. 11.

(*o*) Trial per Pais, 279, 209; 1 Vent. 67; *Anon.* 1 Salk. 405.

(*p*) See Finch, L. 484, &c.; Bro. Attaint, 3 Inst. 164.

(*q*) *Groenvelt v. Burwell*, 1 Ld. Raym. 470.

(*r*) *Reg. v. Ingersall*, Cro. El. 309.

(*s*) *Vaugh.* 135; 2 Hale, 315.

ever form of process the same may be commenced, it shall be lawful for the *Judge* before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to *certify under his hand (t), on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject, or not, to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the postea, with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of distringas juratores or habeas corpora juratorum may not be returnable until after such day: provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."*

By sect. 3, "every judgment to be signed by virtue of this act may be *entered and recorded* as the judgment of the Court wherein the action shall be depending, although the Court may not be sitting on the day of the signing thereof; and every execution issued by virtue of this act shall and may bear *teste* on the day of issuing thereof; and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law."

By sect. 4 it is provided, "that notwithstanding any judgment signed or recorded, or execution issued, by virtue of this act, it shall be lawful for the Court in which the action shall have been brought to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby in such manner as upon the reversal of a judgment by writ of error, or otherwise as the Court may think fit to direct."

This statute is not limited to cases of contract, but applies to all actions where the Judge thinks there ought to be early execution (u). And the Judge may certify under this act for immediate execution in an action of debt on simple contract, as well as in other forms of action (x).

It is not requisite that there should be any affidavit to induce the Judge to grant this certificate, though, in some cases, it might be desirable to be prepared with one (y). In order to induce the Judge to

(t) See form, Chit. Forms, 188.

(u) *Barnden v. Cox*, 1 M. & Rob. 203.

(x) *Younge v. Crooks*, 1 M. & Rob. 220; *Barnden v. Cox*, Id. 203; *see vide Fisher v. Davies*, 2 M. & Mal. 93; *Perceival v. Alcock*, 1 M. & Rob. 167.

(y) Lord Lyndhurst, in *Gervais v. Burtchley*, 2 M. & Mal. 150, considered that this affidavit was not admissible, and refused to receive it; but *Bayley, B.*, in *Ruddick v. Simmons*, 1 M. & Rob. 184, held otherwise, and received it.



refuse the certificate, the party may, it seems, shew, by affidavit or otherwise, facts which would constitute grounds for a new trial, or for arresting the judgment, or facts which may induce the Judge to grant time, or other indulgence, as, that the defendant had *bonâ fide* ground for trying the cause, or that he was misled by others, or that he is, at present, unable to pay the damages, but that, if time should be granted, he will be able to raise the money before the next term, or other future day; or that he has property to deposit, which is not immediately convertible into money; or the like (z).

Where a Judge in pursuance of this act orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the next term to the Court, to enter a suggestion to deprive the plaintiff of costs (a).

As to the practice of signing and entering up the judgment when the Judge grants his certificate under this statute, see *post*, 319; and as to the writ of execution thereon, see *post*, 373. 378. See also, as to the moving for a new trial, or arresting the judgment, or staying the execution, *post*, 317. 318.

### SECT. 3.

#### *Trial before the Sheriff, &c., under the 3 & 4 W. 4, c. 42, s. 17.*

By the 3 & 4 W. 4, c. 42, s. 17, it is enacted, "That in any action depending in any of the said superior Courts for any *debt* or *demand* in which the sum sought to be recovered, and *indorsed on the writ of summons*, shall not exceed *twenty pounds*, it shall be lawful for the Court in which such suit shall be depending, or any Judge of any of the said Courts, (if such Court or Judge shall be satisfied that the trial will not involve any *difficult question of fact or law*, and such Court or Judge shall think fit so to do), to order and direct that the issue or issues joined shall be tried before the *sheriff* of the county where the action is brought, ~~or any Judge of any court of record~~ for the recovery of *debt* in such county: and for that purpose a *writ* shall issue directed to such sheriff, *commanding him to try such issue or issues*, by a jury to be summoned by him, and to *return such writ with the finding of the jury thereon indorsed*, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues."

The above statute it will be seen extends only to actions for a *debt* or *demand*, in which the sum sought to be recovered and indorsed on the writ of *summons* does not exceed 20*l.* It does not, therefore, it should seem, extend to a case in which the action, though not exceeding 20*l.*, is commenced by writ of *capias*, or *detainer*, or to a case

(s) See Chlt. Sum. Prac. 365.

(a) *Baddley v. Oliver*, 1 Dowl. P. C. 598.

where the debt is not indorsed on the writ of summons, or to a claim for a tort (b).

In support of an application to the Court under this act, make an affidavit of the circumstances as to the nature of the cause of action, that issue has been joined in it, and that the trial will not involve any difficult question of fact or law, and give it to counsel with a motion paper, to move for a rule nisi "to shew cause why the issue joined in this cause should not be tried before the sheriff of ——" (c); draw up the rule with the clerk of the rules, and serve a copy of it on the opposite attorney, and afterwards move to make it absolute on an affidavit of service (d). Draw up the rule absolute with the clerk of the rules. If the application be made to a Judge, make the affidavit above mentioned; take out a summons to shew cause why the issue joined in the cause should not be tried before the sheriff, &c. Serve a copy on the opposite attorney, and the Judge, upon your producing the affidavit above mentioned, will, in general, grant his fiat (e) for the trial to take place before the sheriff, &c. In some cases, perhaps, the Judge would not require this affidavit.

Having obtained the rule or order for that purpose, as above mentioned, prepare the writ for the trial (f); engross it on plain parchment, get it sealed, pay 7d.: and signed. Indorse on it a memorandum of the day on which it is to be executed; annex the rule or order to it, and leave it at the sheriff's office a reasonable time (at least two days) before the day of trial; pay 1l. 9s. 4d. in London or Middlesex; and 1l. 11s. 6d. in other counties. Pay also 4d. additionally for each witness. The sheriff will thereupon summon the jury.

The plaintiff must give a written notice of the intended trial, the same as on a trial at Nisi Prius, (see ante, 223, 224), viz. 8 or sometimes 14 days' notice when the trial is to be had in London or Middlesex, or 10 days' notice when it is to be had in any other county, exclusive of the day on which it is given, and inclusive of that on which the trial is to take place (h).

After giving notice of the trial, the next step to be taken is to subpoena the witnesses, and which may be as in other cases. (See ante, 245, 246).

If you wish to attend the trial by counsel, you should give notice thereof to the opposite party (i). A written notice would not be requisite (k). The master, it seems, may or may not in his discretion allow costs for the attendance of counsel, and preparing briefs, &c., though this has not yet been decided by the Court (l).

Attend, at the time appointed, with your counsel and witnesses; and the trial will be taken in nearly the same manner as at a trial at nisi prius, (ante, 271 to 286 b). The sheriff or his deputy, or Judge presiding at the trial, has the like powers with respect to amendments on such trial as are given to Judges at Nisi Prius, by the 3 & 4 W. 4, c. 42, ante, 282. (3 & 4 W. 4, c. 42, s. 18). The verdict of the jury

(b) *Watson v. Abbott*, 23rd Nov. 1833, Exch. MSS. cor. *Bayley*, B.

(c) See form, Chit. Forms, 165 a.

(d) See a form of affidavit, Chit. Forms, 417.

(e) See form, Chit. Forms, 165 a.

(f) See form, Chit. Forms, 165 b.

(h) See the form, Chit. Forms, 165 b.

(k) *Elliot v. Micklin*, 5 Price, 641.

(l) See *Ullock v. Hemsworth*, Tidd, 9th ed. 580.

on the trial will be as valid and of the like force, as a verdict of a jury at *nisi prius*. The plaintiff may be nonsuited at the trial (*m*).

By sect. 18, of the above act of 3 & 4 W. 4, c. 42, it is enacted, "That at the return of any such writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, or his deputy, or the Judge before whom such trial shall be had, shall certify under his hand (*n*) upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order (*o*); and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *Nisi Prius*, and the sheriff or his deputy, or Judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given (*ante*, 282) to Judges at *nisi prius*." To procure the above certificate of the sheriff or order of the Judge, it is not unusual to make an affidavit of the facts to induce him to grant it (*p*).

It should seem that the defendant is entitled to have the writ, upon which the trial was had filed; and that if the plaintiff's attorney refuse to file it, or shew it to the defendant's attorney, the Court will compel him to do so, and to pay the costs (*q*).

By the 19th section of the 3 & 4 W. 4, c. 42, it is enacted "that all the provisions contained in the 1 W. 4, c. 70, shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon these writs for the trials of issues, in like manner as if the same were expressly re-enacted herein."

#### SECT. 4.

#### Plea puis darrein continuance.

If any matter of defence arise after the defendant has pleaded, and before the jury have actually delivered their verdict, the defendant may avail himself of it by a plea, termed a "*plea puis darrein continuance*." Thus, if, after plea pleaded, the plaintiff give the defendant a release, the latter may plead the release *puis darrein continuance* (*r*). Or, if the plaintiff or defendant have become bankrupt, &c. the bankruptcy may be pleaded *puis darrein continuance* (*s*). So,

(*m*) *Watson v. Abbott*, 23rd Nov. 1833, MSS. cor. Bayley, B.

(*n*) See form, Chit. Forms, 165 d.

(*o*) See form of summons and order, Chit. Forms, 165 d.

(*p*) See form, Chit. Sum. Prac. 358.

(*q*) See the practice as to writs of inquiry, *post*, Vol. 2, 519.

(*r*) In the case of a co-plaintiff executing a release against the consent of the other plaintiff, the Court, if a case of fraud be made out, will set it aside; and this is the only mode of defeating it, (*Jones v. Herbert*, 7 Taunt. 421; *Alder v. George*, 1 Camp. 302), especially if

the plaintiffs be suing as trustees for another person. (*Mountstephen v. Brooke*, 1 Chit. Rep. 390, 1 B. & Ald. 224, S.C.; but see *Sainsbury v. Gandon*, 3 M. & R. 16). So, if there be only one plaintiff who sues as trustee, and he fraudulently releases, it might be set aside. (*Innell v. Newman*, 4 B. & Ald. 419; *Doe v. Franklin*, 7 Taunt. 9; *Hickey v. Burt*, *Id.* 48.)

(*s*) See *Lovell v. Eastaff*, 3 T. R. 554; *Duff v. Campbell*, 3 B. & Ald. 577; *Biggs v. Cor*, 4 B. & C. 920, 7 D. & R. 409, S.C.; *Todd v. Maxfield*, 6 B. & C. 105, 9 D. & R. 171, S.C.; *Bretherton v. Osborne*, 1 Dowl. P. C. 457.

where an action of ejectment was brought, and, after issue joined, the lessor of the plaintiff entered into part of the premises, the Court held that the defendant might plead this matter *puis darrein continuance* (o). So, it has been holden that an award made in the cause, after issue joined, could not be given in evidence under the original pleadings, but should have been pleaded *puis darrein continuance* (p). So, in an action against an executor, the defendant may plead a judgment recovered against him *puis darrein continuance* (q). The defendant cannot plead a release by one of the lessors of the plaintiff in ejectment (r).

If the matter of defence have arisen *before* the return of the *venire*, it should regularly be pleaded in bank, and before any subsequent step is taken in the cause (s). In such a case, it must be engrossed on plain paper, and filed with the clerk of the papers, in the same manner as other special pleas (t).

But if the matter of defence have arisen *after* the return of the *venire*, then the defendant should plead it *puis darrein continuance* at *Nisi Prius* or the assizes, either when the cause is called on, or at any other time before the jury have actually delivered their verdict (u); or if the jury remain *propter defectum juratorum*, the defendant may plead it in bank at the return of the *distringas* (x). In a late case, where the plaintiff became a bankrupt, and the assignment to the assignees was executed on the day of the last continuance in *banc*, and the defendant did not plead the plea till the assizes, the Court refused to set it aside, as it did not appear that the assignment was executed sufficiently early to allow the defendant to plead it on the last continuance day (y). The plea may be put in at *Nisi Prius* upon paper, and it is the duty of the attorney afterwards to transcribe it on the *Nisi Prius* record (z).

A plea *puis darrein continuance* may be pleaded, though the defendant be under terms of pleading issuably and taking short notice of trial (a): but it cannot be pleaded after a demurrer (b); nor after verdict (c). Where a person who has become bankrupt is sued for a cause of action arising before his bankruptcy, and pending the suit and

(o) *Moore v. Hawkins*, Yelv. 180; *Hawkins v. Moore*, Cro. Jac. 261, S. C.; *sed vide Doe v. Brewer*, 2 Chit. Rep. 323, 4 M. & S. 301, S. C.

(p) *Storey v. Bloxam*, 2 Esp. 504.

(q) *Prince v. Nicholson*, 5 Taunt. 333, 1 Marsh. 70, S. C.; and see *Prince v. Nicholson*, 5 Id. 665, 1 Id. 280, S. C.; *Lyttleton v. Cross*, 3 B. & Cres. 317, 5 D. & R. 175, S. C.

(r) *Doe v. Brewer*, 2 Chit. Rep. 323, 4 M. & S. 301, S. C.

(s) See *Duff v. Campbell*, 3 B. & Ald. 577; *Soutten v. Soutten*, 1 D. & R. 521, 5 B. & A. 852, S. C.; *Rez v. Taylor*, 5 D. & R. 521, 3 B. & C. 612, S. C.; but see *Prince v. Nicholson*, 5 Taunt. 333, 1 Marsh. 70, S. C.

(t) See the form, Chit. Forms, 166;

Arch., Pl. & Ev. 323.

(u) See Bul. N. P. 310; Dy. 361; *Fitch v. Toulmin*, 1 Stark. 62. See the form of the plea in such a case, Chit. Forms, 166, 167; Arch. Pl. & Ev. 323.

(x) 22 H. 6; 1 Bro. Continuance, 30. See Lutw. 1143.

(y) *Bretherton v. Osborne*, 1 Dowl. P. C. 457.

(z) *Myers v. Taylor*, R. & M. 404, 2 C. & P. 306, S. C.

(a) *Bryant v. Perring*, 2 M. & P. 760, 5 Bing. 414, S. C.

(b) *Day v. Savage*, Moore, 871; *Martin v. Wyvill*, 1 Str. 492.

(c) 2 Lutw. 1143; Bul. N. P. 310; Cro. Jac. 646. See *Lovell v. Eastaff*, 3 T. R. 554.

before trial, obtains his certificate, he must plead it *puis darrein continuance*; and if he neglect to do so, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment (*d*). In an action which had been set down for trial in the term as undeferred, and postponed on the condition of giving judgment of the term, a plea of *puis darrein continuance* of the defendant's bankruptcy and certificate, the certificate having been obtained since the term, is admissible (*e*). And a bankrupt who had obtained his certificate after issue, and before judgment, and had rendered after judgment in discharge of his bail, was liberated by the Court of Common Pleas, on a summary application, although he had not pleaded his certificate *puis darrein continuance* (*f*).

Also, if the matter of the plea arose *previously* to the last continuance, the plea, if pleaded in bank, will be set aside; or, if pleaded at the assizes, the Judge will not receive it (*g*). Yet even in these cases, the Court have, under peculiar circumstances, allowed the defendant to plead it *nunc pro tunc* (*h*).

If the matter of it have arisen since the last continuance, and the plea be verified on oath, (for this being a dilatory plea, an affidavit of the truth of it must be annexed to it), whether it be pleaded in bar or in abatement (*i*), the Court are bound to receive it, even although it be clearly bad on the face of it, or however irregularly pleaded (*k*). In order, however, to prevent pleas of this kind being used for the mere purpose of delay, if the plaintiff demur to them, the Court will order them to be set down for argument for the first paper day in term, so that the plaintiff may have judgment as soon as he would have had, if they had not been pleaded (*l*).

The defendant cannot plead double *puis darrein continuance* (*m*).

If pleaded at the assizes, it is said the plea cannot be amended after the assizes (*n*); although, when pleaded in bank, the Court have allowed it to be amended, upon the terms of the defendant taking short notice of trial (*o*).

By pleading *puis darrein continuance* you waive your former pleading (*p*); and the case then stands in the same state as if this had been the plea originally put in. Also, if this be even a plea in abatement, if the original plea have been a plea in bar, the judgment, on demur-

(*d*) *Todd v. Marfield*, 6 B. & Cres. 105, 9 D. & R. 171, S. C.

(*e*) *Whitmore v. Bantock*, 1 M. & M. 122.

(*f*) *Humphreys v. Knight*, 6 Bing. 572.

(*g*) *Wilson v. Wymondell*, Say. 268; but see *Willoughby v. Wilkins*, 2 Smith, 306; *Lytleton v. Cross*, 3 B. & Cres. 317, 5 D. & R. 175, S. C. 4 B. & Cres. 117, 5 D. & R. 81, S. C.

(*h*) See *Duff v. Campbell*, 3 B. & Ald. 577; *Lowell v. Eastaff*, 3 T. R. 554.

(*i*) *Freem. 252*; *Martin v. Wyvill*, 1 Str. 493; *Willoughby v. Wilkins*, 2 Smith, 306. The affidavit, if made at the assizes, should be sworn before one of

the Judges of assize.

(*k*) *Paris v. Salkeld*, 2 Wils. 137; *Lowell v. Eastaff*, 3 T. R. 554; *Fitch v. Toulmin*, 1 Stark. 62; *Prince v. Nicholson*, 5 Taunt. 337, 1 Marsh. 401, S. C.; see *Bul. N. P. 309*, *contra*. See *Jones v. Herbert*, 7 Taunt. 421; and the form of the affidavit of verification, Chit. Forms, 168.

(*l*) *Fitch v. Toulmin*, 1 Stark. 62.

(*m*) *Bro. Continuance*, 5, 41; *Gillb. C. P. 105*.

(*n*) *Bul. N. P. 309*; *Freem. 252*; *Moore v. Hawkins*, *Yelv. 181*.

(*o*) *Lindo v. Simpson*, 2 Smith, 659.

(*p*) *Barber v. Palmer*, 1 L. Raym. 693, 1 Salk. 178, S. C.

rer as well as on verdict, will be peremptory, *quod recuperet*, and not a *respondeas ouster* (q); therefore, before you plead *puis darrein continuance*, you should, in general, be satisfied that the matter of such plea will be a better and safer defence to the action, than the plea originally pleaded (r).

If this plea be put in at the assizes, or at *Nisi Prius*, no further proceedings can be had on it there; but it must be certified on the back of the record at *Nisi Prius*, and returned to the Court above (s). And if one of the two defendants plead a plea of bankruptcy *puis darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant (t). After the record is thus returned, the plaintiff may reply or demur to the plea, and then proceed as in ordinary cases (u).

As regards the costs on a plea *puis darrein continuance*, where, in covenant against executors, the defendant pleaded *plene administravit* and a retainer, and afterwards at the trial the defendant pleaded a plea *puis darrein continuance*, to which the plaintiff replied, and the defendant demurred to the replication, and judgment was given for the defendants on the demurrer, it was held that they were entitled to the costs incurred after the plea *puis darrein continuance*, but not to the costs of the whole cause (x). Where the defendant, an uncertificated bankrupt at the time of his arrest, put in bail and pleaded the general issue, and afterwards delivered a plea of his bankruptcy and certificate *puis darrein continuance*, on which the plaintiff withdrew the record, and countermanded notice of trial, and the defendant, after rule to reply, signed judgment of *nonpro*s and taxed his costs, the Court of Common Pleas ordered the proceedings on the judgment to be stayed without costs (y).

*Audita querela.*] This writ is given in order to afford a remedy to the defendant, where matter of defence (such as a release, &c.) has arisen since the judgment. But the indulgence now shewn by the Courts, in granting a summary relief upon motion (z), has rendered this proceedings by *audita querela* almost obsolete. The reader is therefore referred, for information upon the subject, to Bacon's Abr. tit. "*Audita querela*," and to 2 Sellon, 253—258, 2 Saund. 137 c.

(q) Gilb. C. P. 105; Freem. 252.

(r) *Pascall v. Horsley*, 3 C. & P. 372.

(s) Cro. Jac. 361; *Abbott v. Rugeley*, 2 Mod. 307; Freem. 252.

(t) *Pascall v. Horsley*, 3 C. & P. 372.

(u) See, upon this subject generally, Arch. Pl. & Ev. 321 to 325.

(x) *Lyttleton v. Cross*, 4 B. & Cres.

117, 6 D. & R. 81, S. C.

(y) *Baker v. Morrey*, 1 M. & P. 138.

(z) See *Wicket v. Cremer*, 1 L. Raym. 439; *Lister v. Mundell*, 1 B. & P. 427; *Baker v. Ridgway*, 9 Moore, 114, 2 Bing. 41, S. C.; *Hanson v. Blakey*, 1 M. & P. 261, 4 Bing. 493, S. C.

## SECT. 4.

## Jury.

1. Who may be Jurors, 290 to 292.
2. Challenges, 292 to 297.

## 1. Who may be Jurors.

*Who may be jurors.*] All persons, possessing the property necessary by law to qualify them to serve on juries, may be jurors;—with the following exceptions: viz. aliens cannot serve on a jury, unless the jury be *de medietate linguæ*; (6 G. 4, c. 59, s. 3) (a); nor can persons attainted of treason, or felony, or of any crime that is infamous, unless they have obtained a pardon; (*Id.*); nor can any person who is under outlawry, or excommunication; (*Id.*); nor women, unless on a writ *de ventre inspiciendo* (b).

Those who are merely exempted from serving on juries, may be classed under the following heads: viz. peers; Judges of the Courts of record at Westminster; clergymen in holy orders; qualified Roman catholic clergymen; qualified protestant dissenting clergymen; serjeants and barristers-at-law actually practising; doctors and advocates of the civil law actually practising; attornies and proctors duly admitted, and actually practising in the courts of law or equity, or in the ecclesiastical or admiralty courts, who have taken out their annual certificates; officers in any of these courts, actually executing the duties of their offices; coroners; gaolers and keepers of houses of correction; members and licentiates of the royal college of physicians in London, actually practising; surgeons who are members of one of the royal colleges of surgeons in London, Edinburgh, or Dublin, and actually practising; apothecaries certificated by the court of examiners of the apothecaries' company, and actually practising; officers of the navy or army on full pay; pilots licensed by the Trinity-house of Deptford, Hull, or Newcastle, masters of ships in the buoy and light service, and pilots licensed by the lord warden of the cinque ports or under any act of parliament or charter in any other port; the household servants of his majesty; officers of the customs or excise; sheriffs' officers, high constables and parish clerks: these shall be exempt from serving on juries, and their names shall not be inserted in the jury lists. (6 G. 4, c. 50, s. 2). Also, persons exempt from serving on juries by prescription, charter, grant, or writ, shall continue to enjoy such exemption as they did before this act. (*Id.*). In Middlesex, no person shall be returned to serve on a jury at *Nisi Prius*, who has served as a juror in either of the two preceding terms or vacations, having the sheriff's certificate of having so served; and

(a) But a special juror can be challenged for alienage, if at all, only at the time when the special jury is struck.

*Res v. Despard*, 2 M. & R. 406, 8 B. & Cres. 417, S. C.

(b) *Trial per Pais*, 86. *Post*, 293.

no person shall be returned to serve on a jury at the assizes, who has before served on a jury, in Yorkshire within four years, in Wales or in the counties of Hereford, Cambridge, Huntingdon or Rutland, within one year, or in any other county within two years, having the sheriff's certificate of having so served; (6 G. 4, c. 50, s. 42); which certificate the sheriff is bound to give to every common juror serving or attending as such, but not to grand or special jurors. (*Id.* s. 40). And if any sheriff shall return a person as juror within the times above mentioned, the Court, on examination and proof of such offence in a summary way, may set such fine upon the offender as the Court shall think meet. (*Id.* s. 42). In all these cases of exemption, the party, if summoned, should either attend and claim his privilege (c), or should get some person to attend for him, who will be able to satisfy the Court as to his title to such exemption.

*Qualifications of jurors.*] Every man, between the ages of 21 years and 60, who shall have within the county in which he resides, in his own name or in trust for him, 10*l.* by the year above reprises in lands or tenements, of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of such lands or tenements, or in lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or some other person,—or who shall have, within the same county, 20*l.* by the year above reprises in lands or tenements held by lease for 21 years or longer, or for a term of years determinable on any life or lives,—or who, being a householder, shall be rated or assessed to the poor rate, or to the inhabited house duty, in Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*,—or who shall occupy a house containing not less than 15 windows :—shall be qualified and liable to serve on juries. (6 G. 4, c. 50, s. 1).

In London, a juror must be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the said city, and have lands, tenements or personal estate of the value of 100*l.* (6 G. 4, c. 50, s. 50).

As to special jurors :—all those described in the jurors' book as esquires or persons of higher degree, or as bankers or merchants, shall be qualified and liable to serve on special juries; and the sheriff or under-sheriff shall set down their names in alphabetical order, in a list to be called "the special jurors list," and shall prefix to each name a number; which numbers shall also be written out on distinct pieces of parchment or card, and put into a drawer or box, to be kept for the purpose of nominating special juries. (6 G. 4, c. 50, s. 31, as mentioned *ante*, 261).

Upon writs of inquiry executed in London, or in any county in England or Wales, the jurors must be qualified in like manner as jurors at *Nisi Prius* in the same city, county, &c.; but if executed in any liberty, franchise, city, borough, or town corporate not being a coun-



ty, or in any city, borough or town being a county of itself, the jurors may be of the same description as was usual before the passing of this act. (6 G. 4, c. 50, s. 52) (d).

In a jury *de medietate lingue*, (which is allowed only in cases of felony and misdemeanor), the aliens need not be qualified as above mentioned. (6 G. 4, c. 50, s. 47).

*How punished for non-attendance.*] If any man, summoned to attend on a jury, shall not attend in pursuance of such summons, or being thrice called shall not answer to his name; or if any such man, or any talesman, after being called, shall be present but not appear, or after appearance shall wilfully withdraw himself from the presence of the Court: the Court shall set such fine upon him as the Court shall think meet, and in the case of a viewer not less than 10*l.*, unless some reasonable ~~excuse~~ excuse shall be proved by oath or affidavit: (6 G. 4, c. 50, s. 38, 51); or upon such default at the execution of a writ of enquiry, the under-sheriff, &c. may set a fine not exceeding 5*l.* (*Id.* s. 53).

## 2. Challenges.

When a full jury appear (e), either party may challenge them for cause,—as well the talesmen, (6 G. 4, c. 50, s. 37), as the jurors originally returned.

Challenges are of two kinds: to the array, or to the polls; and each of these are again subdivided into principal challenges, and challenges to the favour. In this order they shall now be considered.

*To the array.*] A challenge to the array is an objection to all the jurors returned by the sheriff, collectively (f), not for any defect in them, but for some partiality or default in the sheriff, or his under officer who arrayed the panel (g). This is either a principal challenge, or a challenge to the favour.

The causes of principal challenge to the array, are such as the following: viz. that the sheriff or other returning officer is of kindred or affinity to the plaintiff or defendant, if the affinity continue; that one or more of the jury are returned at the nomination of the plaintiff or defendant; that an action of battery is pending at the suit of the plaintiff or defendant against the sheriff, or at the suit of the sheriff against the plaintiff or defendant; that an action of debt is pending at the suit of the plaintiff or defendant against the sheriff, but not if by the sheriff against the plaintiff or defendant; that the sheriff or returning officer holds land depending upon the same title with that in litigation between the parties; that the sheriff, &c. is under the distress of the plaintiff or defendant; that the sheriff, &c.

(d) As to a "good jury" in writs of inquiry, see post, Vol. 2, Book 2, Part

4, Chap. 4, Sect. 1.

(e) See *Rex v. Edmonds*, 4 B. & Ald.

471.

(f) Co. Lit. 156, 158.

(g) 3 Bl. Com. 359.

is counsel, attorney (*h*), officer, servant, or gossip of either party; or is an arbitrator in the same matter and has treated thereof (*i*). Formerly, where a peer was a party, the array might be challenged, if a knight were not returned of the jury; but this has been expressly altered by stat. 6 G. 4, c. 50, s. 28; nor shall any challenge be now allowed for want of hundredors. (*Id.* s. 13).

The causes of challenge to the array for favour, are such as imply, at least, a probability of bias or partiality in the sheriff, but do not amount to a principal challenge. Thus, that the plaintiff or defendant is tenant to the sheriff; or that the son of the sheriff has married the daughter of the plaintiff or defendant; or the like (*k*).

What has been said here, as to challenges to the array, must, perhaps, be understood as having reference only to common and not to special juries; for it seems very doubtful if the array in special jury cases can be challenged. (*See* 6 G. 4, c. 50, s. 27, *infra*) (*l*). Nor indeed are challenges to the array very usual in common jury cases; for if there be an objection to the sheriff, you may have the *venire* directed to the coroner, as mentioned *ante*, 216, 217; besides, this objection would be a good ground for arresting the judgment (*m*).

*To the polls.*] A challenge to the polls is an exception to one or more of the jurors who have appeared, individually; and this is either a principal challenge, or a challenge to the favour. The causes of principal challenge to the polls may be classed under the following heads—

1. Challenge *propter honoris respectum*: as, if a lord of parliament be put upon a jury, he may challenge himself, or he may have a writ of privilege for his discharge (*n*); but it is doubtful if either party can challenge him, for he is merely exempted from serving by stat. 6 G. 4, c. 50, s. 2; *vide infra*.

2. Challenge *propter defectum*: that the juror is not qualified to serve upon a jury. (*See ante*, 291). Thus, that he has not sufficient property, or is not otherwise qualified, as required by stat. 6 G. 4, c. 50, (*see ante*, 291), in which case he shall be discharged, if the Court be satisfied of the fact; (6 G. 4, c. 50, s. 27) (*o*); but this does not extend to special jurors: that he is an alien (*p*), excepting, of course, where the jury are *de medietate linguæ*; (6 G. 4, c. 50, s. 3); or the juror be a special one (*q*); that he is within the age of twenty-one (*r*); or that he is an idiot or lunatic (*s*): so if a woman be impanelled, she may be challenged *propter defectum sexus* (*t*), unless

(*h*) *Baylis v. Lucas*, Cowp. 112.

(*i*) Co. Lit. 156.

(*k*) Id.

(*l*) *Rex v. Johnson*, 2 Str. 1000; *Rex v. Burridge*, 1 Str. 593, 2 L. Raym. 1364, S. C.

(*m*) *Baylis v. Lucas*, Cowp. 112.

(*n*) Co. Lit. 15; 2 Hawk. c. 43, s. 11; 3 Bl. Com. 361.

(*o*) Co. Lit. 156.

(*p*) Id.

(*q*) *Semb. Rex v. Despard*, 2 M. & R. 406, 8 B. & C. 417, S. C.

(*r*) Co. Lit. 157; and *see* 6 G. 4, c. 50, s. 1; *ante*, 291.

(*s*) Gilb. C. B. 95.

(*t*) 3 Bl. Com. 362.

impanelled on the writ *de ventre inspiciendo* (u). But a matter which merely *exempts* a man from serving on a jury, and does not incapacitate him, can never be a cause of challenge; and it is said (v) that if a person, thus exempted, be summoned, and appear, he cannot excuse himself from serving on a jury, if there be not a sufficient number of jurors without him.

If a juror be erroneously named in the *distringas*, panel, &c. and sworn by such wrong name,—if the error be in the christian name, it amounts only to a matter of challenge, and cannot be objected to after verdict (w); if in the surname, (particularly where the person serving is not the same that was intended to be summoned), the Court have, in such a case, set aside the verdict (x); but in another case (y), the Court held that it was discretionary with them to grant a new trial in such a case, or not: and that they would not do so, unless the mistake as to the juror had been productive of some injustice.

3. Challenge *propter affectum*: by reason of some supposed bias or partiality. Thus, that the juror is of kin to either party, within the ninth degree (z), or, according to Lord Coke, however remote the kindred (a);—that there is affinity or alliance by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; for otherwise it would be but a challenge to the favour (b);—that the juror is godfather to the party's child, or the party godfather to the juror's child;—that the juror has land which depends upon the same title as the land in question;—or, in a cause where the parson of a parish is party, and the right to the church comes in debate, that the juror is a parishioner, is a good cause of challenge; and so in all other cases where the juror has an interest in the action, direct or collateral;—that the juror has before given a verdict in the same cause, or upon the same title or matter, though between other parties;—that he was chosen arbitrator in the same cause by one of the parties, and had entered upon an examination of it; but otherwise, if he were chosen indifferently by both parties;—that he is counsellor, servant, or of fee, of either party (c); that he is tenant of either party (d);—that he is of the same society or corporation with either party (e); but, that he is his fellow-servant, is but a challenge to the favour (f);—that he has taken information of the case, before he is sworn (g);—that he has declared his opinion of the case beforehand (h);—that since he has been returned,

(u) See *Willoughby's case*, Cro. El. 366, ante, 290.

(v) 2 Hawk. c. 43, s. 26.

(w) *Wray v. Thorn*, Willes, 488; *Hill v. Yates*, 12 East, 230 (a), 2 Moore 80, S. C.; 2 Burn. J. 184.

(x) *Norman v. Beaumont*, Willes, 484, Barnes, 453, S. C.; *Dorey v. Hobson*, 6 Taunt. 460, 2 Marsh. 154, S. C.; and see *Russell v. Bull*, Barnes, 455.

(y) *Hill v. Yates*, 12 East, 229.

(z) Finch, L. 401; 3 Bl. Com. 363.

(a) Co. Lit. 157.

(b) Id.

(c) Id.

(d) Gillb. C. B. 95.

(e) 3 Bl. Com. 363.

(f) Co. Lit. 157.

(g) 2 Hale, 306.

(h) 2 Hawk. c. 43, sect. 28.

he has eaten or drunk at the expense of one of the parties (i); but, that one of the parties has lately been entertained at the juror's house, is only matter of challenge to the favour (j);—that one of the parties has laboured the juror, and given him money or other thing for giving his verdict; but if the party only labour the juror to appear and act conscientiously, it is no matter of challenge whatever;—that an action, implying malice or displeasure, is pending between the juror and one of the parties; but if not implying malice, &c. it is but matter of challenge to the favour (k).

4. Challenge *propter delictum*: when, for some act of the juror, he has ceased to be, in consideration of law, *probus et legalis homo*. Thus, that he has been attainted of treason or felony, or convicted of any crime that is infamous, of which he has not obtained a free pardon; (6 G. 4, c. 50, s. 3); or that he is under outlawry, or excommunication. (*Id*).

The challenge to the polls for favour is of the same nature with the principal challenge *propter affectum*, but of an inferior degree. The general rule of law is, that the juror shall be indifferent; and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favour, according to the degree of probability of his being biassed. The cause of a principal challenge to the polls, we have seen, is such matter as carries with it, *prima facie*, evident marks of suspicion either of malice or favour. But when, from circumstances, it appears probable, that a juror may be biassed in favour of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favour. The effect of these two species of challenge is the same; the only difference between them is in the mode of trying them.

*When and how to be made.*] No challenge, either to the array or to the polls, can be made, before a full jury have appeared (l). It is immaterial which party challenges first; but the party who first begins to challenge must finish all his challenges before the other begins; otherwise he is precluded from making any further challenge. Also the challenges of the party who challenged first, shall be first tried (m).

The challenge to the polls is made *ore tenus*; and it is not in general required that the party challenging shall immediately declare his cause of challenge, unless there be not a sufficient number of jurors remaining on the panel, or that the other side challenge *touts par avail* (n). But if the juror were formerly sworn in the same cause, and be now challenged (in which case the cause of challenge must have arisen since the juror was before sworn); or if, after a

(i) Co. Lit. 157.

(j) *Anon.* 3 Salk. 81.

(k) Co. Lit. 157.

(l) 2 Hawk. c. 43, sect. 1.

(m) Tr. per Pais, 144.

(n) *Id.* 143.

challenge to the array is tried and overruled, the party challenge the polls; the party must declare his cause of challenge presently (o). If a juror be challenged, and the challenge tried and overruled, he may still be challenged by the opposite party (p).

The challenge to the array must be in writing. It may be in the following form: "*And now at this day, to wit, on ———, come as well the aforesaid J. S. as the aforesaid J. N. by their respective attorneys; and the jurors of the jury, impanelled, being summoned, also come; and hereupon the said J. N. challengeth the array of the said panel; because he saith that [here set forth the matter of challenge with certainty and precision]. And this he is ready to verify, wherefore he prayeth judgment, and that the said panel may be quashed (q).*"

*How tried.*] As to challenges to the array, it lies entirely in the discretion of the Court how they shall be tried; sometimes they are tried by two of the coroners, sometimes by two of the jury (r). If the challenge, however, be a principal challenge, it may be tried by the Court itself, without the aid or intervention of triers.

If the array be quashed as to the sheriff, a new venire shall be awarded to the coroner; if quashed as to the coroner, then the venire is awarded to persons appointed by the Court for that particular purpose, called elisors, to whose array no challenge is allowed (s). If the array be not quashed, the party may then make his challenges to the polls.

Challenges to the polls, if to the favour, are thus tried: If two jurors have been already sworn, they shall try the challenge; if not, the Court appoint two indifferent persons to try it, and who are thence named triers. If the triers try one juror, and he be found indifferent, he shall be sworn; and then he and the two triers shall try the next. When another is found indifferent, the two triers shall be superseded, and the two first so sworn on the jury shall try the next (t). The following oath is previously administered to those who try the challenge: "*You shall well and truly try whether J. S. [the juror challenged] stand indifferent between the parties to this issue; so help you God*" (u). But where the challenge to the polls is a principal challenge, it is tried by the Court, without the aid or intervention of triers. And indeed in both cases, of principal challenge and challenge to the favour, the associate or clerk of Nisi

(o) Co. Lit. 158.

(p) Id.

(q) See the form of a challenge to the array, Chit. Forms, 168; that the jury were returned at the instance of the party, 2 Burn, J. 668;—that the sheriff is of kin to one of the parties, Id.;—that the sheriff is an alderman, and interested in the event of the trial, Cr. Cir. Comp. 105;—that the sheriff is a citizen and a freeman, and has paid a

sum of money towards defraying the expenses of the suit, Id.;—and see a counterplea to this last challenge, and a demurrer to the counterplea, Id. See also, Tr. per pais, 159 to 184; 10 Went. 472; 2 Rich. Prac. C. B. 180; Lil. Ent. 472.

(r) 2 Hale, 275.

(s) Co. Lit. 158.

(t) Id.

(u) Anon. 1 Salk. 132.

*Prius*, upon your intimating to him an objection to any particular person in the panel, will in general refrain from calling him.

The juror himself may be examined as to the matter of challenge, provided it do not tend to his dishonour or discredit (*x*).

After the challenge is decided, if the juror be found indifferent, he is immediately sworn on the jury; if otherwise, he is desired to quit the jury-box, and the officer proceeds to swear the next juror, if not challenged. If a juror be challenged and rejected, he cannot afterwards be sworn as a talesman (*y*).

## SECT. 5.

### *Demurrer to Evidence, and Bill of Exceptions.*

1. *Demurrer to Evidence*, 297.
2. *Bill of Exceptions*, 298.

#### 1. *Demurrer to Evidence.*

When you think that the facts proved do not maintain the issue, the question whether they do or do not being merely a question of law, you may, if you wish, withdraw it from the consideration of the jury, and have it decided by the Court, by demurring to the evidence (*z*). This demurrer, however, is not so much in use as formerly; for the effect of it may, in general, be obtained upon motion for a new trial (*a*).

A demurrer to evidence admits all the facts proved, but alleges that they are not sufficient to maintain the issue. The Court, upon a trial at bar, or the Judge at *Nisi Prius*, are bound to receive it, if tendered; and if they do not, it is a good ground for a bill of exceptions (*b*). If they admit it, the associate is usually ordered to take a note of the testimony, which is immediately signed by the counsel on both sides; and the demurrer being afterwards drawn up in form from it, and engrossed, is tacked to the *postea*, and remitted to the Court above (*c*).

Upon the demurrer being allowed, the jury may proceed to assess the damages conditionally; or, afterwards, if judgment be given for the plaintiff on the demurrer, they may be assessed by another jury,

(*x*) Co. Lit. 158; *Anon.* 1 Salk. 153.

(*y*) *Parker v. Thornton*, 2 Ld. Raym. 1410, 1 Str. 640, S. C.

(*z*) See *Gibson v. Hunter*, 2 H. Bl. 205; *Bulkeley v. Butler*, 2 B. & Cres. 445, 3 D. & R. 625, S. C.; *Miller v. Warre*, 1 C. & P. 239, 240.

(*a*) 3 Bl. Com. 372, 373.

(*b*) *Gibson v. Hunter*, 2 H. Bl. 208.

(*c*) Bul. N. P. 313. See form of demurrer to evidence, Chit. Forms, 169; of a joinder by a defendant, *Id.*; by plaintiff, *Id.* 170.

upon a writ of inquiry (i); and the latter is said to be the most usual course (k).

Upon a demurrer to evidence, if the evidence be matter of record or other written evidence, the opposite party *must* join in demurrer; and the same in the case of parol evidence, provided it be certain and positive. But if parol evidence be either loose and indeterminate or circumstantial merely, the opposite party *may* join in demurrer if he wish it, but he cannot be obliged to do so, unless the party demurring distinctly admit, upon the record, every fact and conclusion which the evidence conduced to prove (l).

In arguing a demurrer to evidence, no advantage whatever can be taken of any defect in the pleadings (m). But after execution of the writ of inquiry, a defect in the pleadings may, of course, be taken advantage of upon motion in arrest of final judgment (n).

In giving judgment upon a demurrer to evidence, the Court will infer, from the evidence demurred to, every conclusion the jury could have inferred from it, had they been allowed to give a verdict (o). But where a demurrer is so negligently framed, that there is no certainty in the statement of the facts proved, the Court, instead of giving judgment upon it, will award a *venire de novo* (p).

## 2. Bill of Exceptions.

If the Judge, at the trial of the cause, either in his direction or decision, mistake the law, the counsel on either side may require him to seal a bill of exceptions (q). It must, however, be upon some point of law, either in admitting or refusing evidence or a challenge, or in some matter of law arising upon fact not denied, in which either party is overruled by the Court (r). On a bill of exceptions the case always goes to the jury (s). If the Judge allow the matter to be evidence, but not conclusive, and so refer it to the jury; as, for instance, where the probate of a will was produced to prove a devise of a term of years, and the Judge left it to the jury, it was holden that a bill of exceptions would not lie (t). Also, as a bill of exceptions can only be available on a writ of error, consequently, where a writ of error will not lie, there can be no bill of exceptions (u). A bill of exceptions may be tendered, as well at a trial at bar as at *Nisi Prius* (x).

The bill of exceptions must be tendered at the trial. Like the

(i) *Cort v. Birkbeck*, 1 Doug. 222, n.

(k) *Darrose v. Newbott*, Cro. Car. 143. See form of entry, where the jury are discharged without assessing damages, Chit. Forms, 169; and where they assess damages conditionally, *Id.* 170.

(l) See *Gibson v. Hunter*, 2 H. Bl. 187 to 209. See the form of a joinder by plaintiff, Chit. Forms, 169; by the defendant, *Id.* 170.

(m) *Cort v. Birkbeck*, 1 Doug. 218 to 223.

(n) *Id.* 222.

(o) *Cocksedge v. Fanshaw*, 1 Doug. 119 to 134.

(p) *Gibson v. Hunter*, 2 H. Bl. 209.

(q) 3 Bl. Com. 372.

(r) *Bul. N. P.* 316.

(s) *Muler v. Warre*, 1 C. & P. 239, 240.

(t) *Chichester v. Philips*, T. Raym. 405.

(u) *Ret. v. Inhabitants of Preston*, Hardw. 249; *Bul. N. P.* 316.

(x) *Thruston v. Slatford*, 3 Salk. 155.

demurrer to evidence, the substance of it must be reduced to writing at the time the objection is made, although it need not then be drawn up in form (y). If the exceptions be truly stated in the bill, the Judge should affix his seal to it; but otherwise, if the bill contain matters false or erroneously stated, or matters wherein the party was not overruled. If the Judge refuse to sign the bill, the party grieved may have a writ upon stat. Westm. 2nd (13 Ed. 1) c. 31, reciting the form of the exception taken and overruled, and commanding "*quod si ita est, tunc sigilla vestra apponatis*;" and if the writ be returned, "*quod non ita est*," the party may have an action against the Judge for the false return (z). If the bill be sealed, both parties are concluded by it as to the truth of the matters contained in it, and the adverse party cannot afterwards aver the contrary, or even supply an omission in it (a).

If the bill of exceptions be not tacked to the record, it is necessary that the whole record should be set forth in it (b); but if tacked to the record, it then merely states the proceedings after issue joined, and the exceptions (c).

As soon as the bill of exceptions is completed, and that judgment has been given upon the verdict, &c. the mode of proceeding is by bringing a writ of error on the judgment, and having the matter determined in a Court of error; for it cannot be determined by the Court in which the record was made up, as in the case of a demurrer to evidence (d). And bringing the writ of error, before the party has obtained the Judge's signature to the bill of exceptions, is deemed a waiver of the bill of exceptions (e). But where the defendant had sent the plaintiff a copy of the bill of exceptions in order to his concurring in the statement of facts, and at the same time sued out a writ of error, the Court of Common Pleas held that the plaintiff had no right to retain the bill of exceptions, in order to frustrate the writ of error, on the ground that the defendant had waived it by suing out such writ (f). And where the defendant below tendered a bill of exceptions and afterwards brought error, the bill of exceptions not having been ready when the writ of error was returned, the Court, on consideration of the circumstances, allowed it to be tacked to the record afterwards (g).

Upon the return of the writ of error, the Judge is called upon to confess or deny his seal (h); and if he confess it, the proceedings are then entered upon record, and the party assigns his errors (i).

(y) Bul. N. P. 316.

(z) *Id.*; 2 Inst. 426; and see *Rowe v. Brenton*, 3 M. & R. 266.

(a) Show. P. C. 120; Bul. N. P. 316.

(b) See the form, Bul. N. P. 317; Tidd, Forms, 327.

(c) See the form, Bul. N. P. 319; Chit. Forms, 170.

(d) *Davenport v. Tyrrell*, 1 W. Bl. 679. Loft, 84, S. C.

(e) *Dillon v. Parker*, 1 Bing. 17, 11 Price, 100, S. C.

(f) *Willans v. Taylor*, 6 Bing. 512.

(g) See *Taylor v. Willans*, 2 B. & Adol. 846.

(h) See Rast. Ent. 293.

(i) 2 Lutw. 905, 906; and see, as to the proceedings on a bill of exceptions generally, *Money v. Leach*, 3 Bur. 1692 to 1742, 1 W. Bl. 555, S. C.; Tidd, 862.



The judgment on the writ of error is, that the former judgment be either affirmed or reversed (*j*). If reversed, a *venire de novo* issues (*k*), which must be returnable in this Court where the record is, although the judgment may have been given in the Common Pleas (*l*). It must be observed, as to costs, that when the bill of exceptions has been tendered by a defendant, the Court of error cannot award him his costs of the trial, &c. upon reversing the judgment (*m*); but they may, the costs of the proceedings on the bill of exceptions (*n*), as to which, the Court in which the cause was commenced have no authority to interfere (*o*).

Although the regular mode of proceeding upon a bill of exceptions is by writ of error; yet the Court in which the record was made up in order to prevent delay and expense, will, in general, before judgment, give you the effect of a writ of error, upon a motion for a new trial. But where a bill of exceptions has been tendered, you cannot obtain a rule for a new trial without first abandoning the bill of exceptions (*p*).

## SECT. 6.

### Nonsuit.

If the plaintiff find that his evidence is not sufficient to maintain his case, he may elect to be nonsuit, in order that he may have an opportunity of bringing it on again, either in another shape, or when better prepared with evidence; for after a nonsuit, which is only a default, he may commence another suit against the defendant for the same cause of action (*q*); but if a verdict be once given, and judgment follow thereon, he is for ever barred from suing the defendant upon the same ground of complaint.

When a plaintiff submits to a nonsuit, it is done usually after he has stated his case or closed his evidence, or after the defendant's case is closed and before the Judge has summed up; but it may be done at any time before the jury have actually delivered their verdict (*r*). It is entirely optional, however, with the plaintiff, whether he will submit to a nonsuit or not; he cannot be compelled to do so, but may insist on the case going to the jury, and take his chance of the verdict (*s*).

(j) Tidd, 865.

(k) *Davies v. Pierce*, 2 T. R. 125, 126.

(l) *Bent v. Baker*, 3 T. R. 36.

(m) *Bell v. Pender*, 5 East, 49, 2 Esp. 712, S. C.

(n) *Gardner v. Baillie*, 1 B. & P. 33, 6 T. R. 591, S. C.

(o) Id. 32.

(p) *Doe d. Roberts v. Roberts*, 2 Chit. Rep. 272.

(q) But he cannot arrest him in the second action without a Judge's order, if he was arrested in the first. (R. H. 2 W. 4, r. 7).

(r) See 3 Bl. Com. 376.

(s) *Watkins v. Towers*, 2 T. R. 275 to 281; *Minchin v. Clement*, 1 B. & Ald. 252; and see *Ward v. Mason*, 9 Price, 291; *Fluorothy v. Bird*, 13 Id. 222, M'Cl. 69, S. C.

In general it is only in cases where a verdict can be given, that the plaintiff can be nonsuited (*t*). And it is said that he can only be nonsuited at the defendant's instance; therefore, when, after a cause was called on and the jury sworn, neither counsel, attorneys, parties nor witnesses appeared, it was holden that the only way was to discharge the jury, for the plaintiff could not be nonsuited (*u*). But the plaintiff may be nonsuited in an undefended cause (*x*). Where a point is reserved at the trial, a nonsuit may be entered on issues found for the plaintiff, notwithstanding there may be issues on the same record found for the defendant (*y*). Where one of two defendants allows judgment to go by default, and the other goes to trial, the plaintiff may be nonsuited, though it was formerly held otherwise (*z*). So, after a plea of tender, the plaintiff may be nonsuited (*a*). So he may, after payment of money into Court (*b*).

If a cause be carried down to trial by proviso and the plaintiff does not appear, he should be nonsuited (*c*); in such a case, however, where a verdict was taken for the defendants by mistake instead of a nonsuit, the Court would not set such verdict aside, unless the plaintiff would consent to a nonsuit being entered (*d*).

A nonsuit can be recorded only at *Nisi Prius*, and not by the Court in banc (*e*). Frequently at *Nisi Prius*, however, when it is doubtful whether the action will lie or the like, the Court allow the plaintiff to take a verdict, with liberty to the defendant to enter a nonsuit if the Court above should, upon application, be of opinion that the action did not lie. But without such leave, the Court above have no authority to order a nonsuit to be entered (*f*).

Upon being nonsuited, the plaintiff is liable to costs, in the same manner as if the defendant had obtained a verdict (*g*).

As to a judgment of nonsuit or nonpros for not declaring, replying, &c., see *Vol. 2, B. 4, Pt. 1, Ch. 18, tit. "Judgment of Nonpros."* And as to a judgment as in case of a nonsuit, see also *Vol. 2, B. 4, Pt. 1, Ch. 24*.

If the Judge at *Nisi Prius* nonsuit the plaintiff through mistake, the Court, upon application, will set aside the nonsuit (*h*). But the Court will not set aside a nonsuit voluntarily suffered by the plain-

(*t*) See *Heath v. Walker*, 2 Str. 1117.

(*u*) *Arnold v. Johnson*, 1 Str. 267.

(*z*) *Halhead v. Abrahams*, 3 Taunt. 81; and see *Treacher v. Hinton*, 4 B. & Ald. 413; 1 M. & R. 261, *a*.

(*y*) *Shepherd v. Bishop of Chester*, 6 Bing. 435.

(*c*) *Murphy v. Donlaw*, 5 B. & Cres. 178, 7 D. & R. 618, S. C.; *Jones v. Gibbon*, 5 B. & Cres. 768, 8 D. & R. 592, S. C.; see *vide Hannay v. Smith*, 3 T. R. 662; *Weller v. Goyton*, 1 Bur. 358; *Harris v. Butterley*, Cowp. 483.

(*a*) *Anderson v. Shaw*, 11 Moore, 44, 3 Bing. 240, 2 C. & P. 85, S. C.

(*b*) *Gutteridge v. Smith*, 2 H. Bl. 374; and see 2 Esp. 482, *n*; *Burstall v. Hor-*

*ner*, 7 T. R. 372; *Rogers v. M'Carthy*, 3 Esp. 106.

(*c*) 2 Saund. 336 *b*; *Mann v. Lovejoy*, R. & M. 357; *Symes v. Larby*, 2 C. & P. 358.

(*d*) *Hodgson v. Forster*, 1 B. & Cres. 110, 2 D. & R. 221, S. C.

(*e*) See *Gardener v. Davis*, 1 Wils. 301; *Hicks v. Young*, Baines, 458.

(*f*) *Minchin v. Clements*, 1 B. & Ald. 252; *Watkins v. Towers*, 2 T. R. 275 to 281.

(*g*) *Cameron v. Reynolds*, Cowp. 407, 2 B. & P. 376, S. C.; *Davila v. Herring*, 1 Str. 300. See the forms of postea, judgment and execution, upon a nonsuit, Chit. Forms, 171, 172.

(*h*) *Sadler v. Evans*, 4 Bur. 1904.

tiff, in order to let him in to plead *de novo* (i); nor will they set it aside, it should seem, on the ground that the case ought to have been submitted to the jury, unless this were desired on the part of the plaintiff at the trial of the cause (k). The Court, however, as a matter of indulgence, will, in some cases, set aside a nonsuit upon payment of costs, and a peremptory undertaking to try at the next sittings or assizes, whether the plaintiff has been nonsuited on account of the non-attendance of his witnesses, or the like (l). If set aside upon payment of costs, such payment is a condition precedent to the setting aside of the nonsuit; and until it be made, the plaintiff cannot proceed to another trial (m).

## SECT. 7.

### Verdict.

1. Verdict 302 to 307.
2. Damages, 307 to 313.

#### 1. Verdict.

The verdict is either general or special. The jury may undoubtedly, in all cases, give a general verdict, thus taking upon themselves to judge of both the law and the fact. Or, (as is most usual, where the questions of law arising in the case are doubtful), they may give a special verdict; that is, they may find the facts of the case specially, leaving to the Court the application of the law to the facts thus found (n). Or they may find a general verdict, subject to a special case. These shall now be separately considered.

*General verdict.*] A general verdict is given *riva voce* by the jury, thus: "*We find for the plaintiff, damages [20l.], costs 40s.;*" or, if for the defendant, then merely "*We find for the defendant.*" If there be several counts in the declaration, and they find for the plaintiff on some, and for the defendant on the rest, the verdict is then given thus: "*We find for the plaintiff on the 1st, 2nd, and 4th, issues, damages [20l.], costs 40s.; and for the defendant on the 3rd, 5th, and 6th issues.*" In replevin, however, if the jury find for the defendant, they must find damages and costs, as in other cases where they find for the plaintiff. This verdict is afterwards entered in form, in what is termed the *postea*, indorsed upon the *Nisi Prius* record (o).

(i) *Hutchinson v. Brice*, 5 Bur. 2692.

(k) *Kindred v. Bagg*, 1 Taunt. 10.

(l) See *Brown v. Utley*, 1 B. & Ald. 253.

(m) *Nichols v. Bozon*, 13 East, 185.

(n) Co. Lit. 228; and see stat. Westm.

2, (13 E. 1), c. 30, sect. 2.

(o) As to the form of entering the verdict on the *postea*, see the 1st section of the next chapter; and see Chit. Forms, 177.

A verdict must comprehend the whole issue or issues submitted to the jury in that particular cause; otherwise the judgment founded on it may be reversed (*p*). As where a jury found Not Guilty as to part, and gave no verdict as to the rest, the judgment was reversed (*q*). But where the jury, in debt on bond, and *nil debet* pleaded, found *nil debet* to part, and *debet* to the rest, it was holden sufficient after verdict (*r*). In an action in form *ex contractu* against several defendants, the verdict must be found against all of them (*s*); but this is not absolutely requisite in an action in form *ex delicto*, unless the plea of one or more of the defendants be such as shews the plaintiff could have no cause of action against any of them (*t*). In *assumpsit* against several defendants as executors, with a plea of *ne unques* executor, the plaintiff may have a verdict against the real executor on the counts laying the promises by the testator; and the other defendants may be discharged (*u*). On a plea by several executors, that they have fully administered, if some are shewn to have assets in their hands, and the others not, the latter are entitled to a verdict (*x*). Also, after a plea in abatement for nonjoinder, if the plaintiff brings another action against the defendant who pleaded that plea and the party named in such plea, but fails in the second action in proving that that party was a contracting party, a verdict may nevertheless be found against the original defendant. (3 & 4 W. 4, c. 42, s. 10; *post*, Vol. 2, Book 2, Part 1, 469). Where, in an action on a promissory note, and also for goods sold and delivered, the plaintiff proved the delivery of the goods before the note was given, and did not shew the consideration of the note to have been distinct from them, it was ruled that the defendant must have a verdict on one of the counts, and that the plaintiff could not take a verdict on one, and have the jury discharged from giving a verdict on the other (*y*).

*Special verdict.*] A special verdict must state the facts proved at the trial, and not merely the evidence given to prove those facts; otherwise the verdict will be insufficient, and the Court will award a *venire de novo* (*z*). But deeds should not be set out in it *in hæc verba*, but merely the substance of them stated, unless the question in dispute rest on their construction. (*R. M.* 1654, s. 20). Yet if the verdict state the contents of a deed, and also set out the deed *in hæc verba*, the Court will not regard the collection the jury have made of the substance of the deed, but the deed itself as set forth (*a*). Also a negative need not be found in a special verdict, unless when necessary to shew that some matter therein mentioned does not come within a particular exception (*b*).

(*p*) *Miller v. Trets*, 1 Ld. Raym. 324.

(*q*) *Cattle v. Andrews*, 3 Salk. 372.

(*r*) *Hadley v. Stiles*, 2 Salk. 664.

(*s*) *Porter v. Harris*, 1 Lev. 63; Ca. Prac. C. P. 107; *Hannay v. Smith*, 3 T. R. 669.

(*t*) *Biggs v. Benger*, 2 Ld. Raym. 1372, 1 Stra. 610, S. C.; *Jones v. Harris*, 2 Str. 1100; Id. 1222. *Quære* as to the action of detinue? see *Garth v. Howard*, 5 C. & P. 346.

(*u*) *Griffiths v. Franklin*, 1 M. & M.

146.

(*x*) *Parsons v. Hancock*, 1 M. & M. 330.

(*y*) *Mutrie v. Harris*, 1 M. & M. 322; and see *Bond v. Rust*, 2 C. & P. 342; *Powell v. Sonnett*, 3 Bing. 381, 11 Moore, 230, S. C.; *Marrack v. Ellis*, 1 M. & R. 511; *Cossey v. Diggon*, 2 B. & Ald. 546.

(*z*) *Bird v. Appleton*, 1 East, 111, 8 T. R. 362, S. C.; *Hubbard v. Johnstone*, 3 Taunt. 209.

(*a*) *Vaugh. 77*.

(*b*) *Mayor of Nottingham v. Lambert*,

The special verdict is dictated by the Court at the trial, and signed by counsel on both sides, before the jury are discharged. If, in settling it, any difference of opinion arise about a fact, the opinion of the jury is taken, and the fact is stated accordingly (c). *Let the plaintiff's attorney get the special verdict drawn, from the minutes taken at the trial, and get it settled and signed by counsel; then deliver it to the attorney of the defendant, who, after getting it settled and signed by his counsel, will re-deliver it to you. If the counsel differ in the mode of settling it, the Judge who tried the cause, being attended by the parties and their counsel, upon summons, will settle it according to his notes. (Vide post, 306). When settled, leave it with the clerk of nisi prius if in a town cause, or with the associate if in a country cause, and he will make out a copy of it for each party. Enter the proceedings on the roll, (as directed ante, 222), to the entry of the special verdict inclusive, and docket and file it of record. Make out a motion-paper for a concilium and get it signed by counsel; take it to the clerk of the rules, and draw up the rule; pay him 6s. 6d.; carry this rule to the office of the clerk of the papers, and he will enter the cause for argument; serve a copy of it on the defendant's attorney. And lastly, copies of the proceedings must be made out upon unstamped paper, and one delivered to each of the Judges; by the plaintiff, to the Chief Justice and the senior Judge; by the defendant, to two of the remaining Judges. The cause must be set down for argument within four days after the day in banc, unless the Court, upon a proper application grounded on affidavits, think proper to enlarge the time. And the paper books, or copies of the proceedings above mentioned, in causes entered for argument on Tuesdays, shall be delivered to the chief and three puisne Judges sitting in the higher Court (d) on the Saturday preceding; and in those entered for Fridays, on the Tuesday preceding, (R. T. 40 G. 3); and the exceptions intended to be insisted upon in argument must be inserted in the margin. (Id. and R. H. 38 G. 3). If the paper books be not delivered, the cause will be struck out of the paper. (MS. E. 1814). But if either party neglect to deliver the books, the other may deliver 'em, and be allowed for them in costs (e), and may then move for judgment without argument.*

The cause will be called on for argument in the order in which it stands in the paper. The plaintiff's counsel then states the pleadings shortly, and the special verdict at length; and then argues the case. The defendant's counsel is next heard in answer; and lastly, the plaintiff's counsel is heard in reply. Only one counsel on each side can be heard. The Court then deliver their judgment. If the Judges coincide in opinion, they deliver their opinions in the order of their precedence; but if they differ, then they deliver their opinions in an inverse order, namely, the junior puisne Judge first, then the second puisne Judge, then the senior puisne Judge, and lastly the Chief Justice.

It is a settled rule that the Court will intend nothing in a special

Willes, 117. See form of a special verdict, Chit. Forms, 174.

(c) 1 Bur. in Pref. iv.; and see R. M. 1684, sect. 20; *Hill v. Yates*, 8 Taunt.

183.

(d) 1 Dowl. P. C. 80.

(e) *Fulham v. Bagshaw*, 1 B. & P. 292; and see R. M. 17 C. 1.

verdict but what is found by the jury (*g*); therefore, where a verdict found a recovery, the Court would not presume a writ of seisin executed, although the recovery would be ineffectual without it (*h*). Yet with this exception, the Court will, in general, construe a special verdict in such a manner as to give effect to it if possible. Therefore, where a special verdict stated that the defendant by his deed "*granted*" to the plaintiff the property in question, in a case where a *release* would have been the only effective conveyance, the Court construed the special verdict as if it stated a release; although it would have been otherwise, had the point arisen upon the construction of pleadings (*i*). So, where a verdict found that *A.* was the son of *B.*, without stating that he was the heir also, the Court said that, as it was in a verdict, they would intend *A.* to be the son and heir of *B.*, no other person being therein found to be heir (*k*). Where a verdict stated an offence to have been committed *contra formam statuti*, where it could not have been so, the Court rejected the words *contra formam statuti* altogether as surplusage (*l*). Also, where the verdict found that *J. S.* "*demised*" for life, and afterwards stated that there had been no livery of seisin, the Court rejected the matter of conclusion as surplusage, and held that there had been no demise (*m*). As to the cases in which the Court will allow a special verdict to be amended, *see Vol. 2, Book 4, Part 1, Chap. 28*. In cases where it cannot be amended, and it is so defective that the Court cannot give judgment on it, a *venire de novo* must be awarded (*n*).

After the Court have decided the case, the party in whose favour the decision is, may immediately sign judgment, tax his costs, and sue out execution, without giving any rule for judgment (*o*).

*Special case.*] Also, where a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the Judge, or the Court above, on a special case stated by the counsel on both sides with regard to the matter of law; which has this advantage of a special verdict, that it is attended with much less expense, and obtains a much speedier decision. On the other hand, however, as nothing appears upon the record but the general verdict, the parties are hereby precluded from the benefit of a writ of error, if dissatisfied with the judgment of the Court or Judge upon the point of law (*p*). But the objection here mentioned is now usually obviated, by the Judge at *Nisi Prius* giving liberty to either party to have the special case afterwards turned into a special verdict, should it become necessary to take the

(*g*) *Duncombe v. Wingfield*, 110b. 262.

(*h*) *Witham v. Derby, Earl of*, 1 Wils.

55.

(*i*) 2 Saund. 97.

(*k*) *Lynch v. Spencer*, Cro. El. 515.

(*l*) 1 Hawk. c. 30, sect. 9.

(*m*) *Sharp v. Sharp*, Cro. El. 482.

(*n*) *Bird v. Appleton*, 1 East, 111;

*Witham v. Derby, Earl of*, 1 Wils. 55.

*See Goodtitle v. Jones*, 7 T. R. 47, 52;

*Buckle v. Hollis*, 2 Chit. Rep. 398.

(*o*) *See post*, 317, R. H. 2 W. 4, r. 67. *See the form of the judgment, Chit. Forms, 175.*

(*p*) 3 Bl. Com. 378.

opinion of a court of error on the case, or it may be done by consent of the parties, and frequently is done, upon the suggestion of the Court, before or after the argument of the special case.

The case ought to be dictated by the Judge at the trial, and signed by counsel on both sides, before the jury are discharged; and if in settling it any difference of opinion arise about a fact, the opinion of the jury may be taken, and the fact stated accordingly (*q*). Yet this, in practice, is seldom done, but the case is afterwards drawn by the junior counsel of the plaintiff, and settled by the junior counsel for the defendant, in the same manner as a special verdict; and if any difference arise between them, the Judge who tried the cause will, upon summons, and being attended by the junior counsel on both sides, settle the case from his notes. In a case in the Common Pleas, where the Judge, upon reference to him, decided that the case, as drawn, was correct, and the junior counsel on both sides, and a serjeant on the part of the plaintiff, signed it, but the defendant's attorney refused to get it signed by a serjeant on his behalf, the Court gave the defendant two days to obtain such signature, and, on his non-compliance, ordered the *postea* to be delivered to the plaintiff (*r*). And where a verdict was found for the plaintiff, with nominal damages, subject to a special case to be prepared by the plaintiff, and he refused to prepare it, the Court of Common Pleas held that the case could not be set down for argument, and that the plaintiff could not be compelled to complete it, but that the defendant might apply to set aside the verdict and have a new trial (*s*). But where the defendant had neglected to settle the case reserved on a *quo warranto*, a rule *nisi* was granted for the *postea* to be delivered over to the prosecutor, and that he should be at liberty to enter up judgment thereon (*t*). The facts proved at the trial, and not merely evidence of facts, must be stated in a special case, in the same manner as in a special verdict (*u*).

The special case is not entered upon record. It must be entered for argument with the clerk of the papers, within the first four days of the term next after the trial at which such special case shall have been reserved; and shall not be set down for argument on any of the last four days of term. (*R. M.* 38 *G.* 3). In every other respect, the mode of proceeding is the same as upon a special verdict.

The case must be argued in the order in which it stands in the paper, unless sufficient cause to the contrary be shewn on affidavit, two days at least previously to the day of argument. (*R. M.* 30 *G.* 2). In arguing it, counsel will not be allowed to state any extrinsic matter; but the Court must judge of the case as it is stated (*x*). If misstated, the parties may have leave to amend it (*y*). But if it do

(*q*) 1 Bur. in Pref. iv.

(*r*) *Jackson v. Hall*, 8 Taunt. 421, 2 Moore, 478, S. C.

(*s*) *Medley v. Smith*, 6 Moore, 53.

(*t*) *Res v. Smith*, 2 Chit. Rep. 398.

(*u*) *Palmer v. Johnson*, 2 Wils. 163.

See the form, Chit. Forms. 176.

(*x*) *Doe v. Lewis*, 1 Bur. 617; and see *Pike v. Carter*, 3 Bing. 85.

(*y*) *Doe v. Lewis*. 1 Bur. 617.

not admit of amendment, and be so defectively stated that the Court cannot give judgment upon it, a new trial will be granted (z).

The *postea* is stayed in the hands of the clerk of *Nisi Prius* or associate, until the question is argued and determined; after which a general verdict is entered for the prevailing party.

## 2. Damages.

*In what actions.*] In real actions, no damages are recoverable. In mixed actions, damages are recoverable, either at common law, or by virtue of some particular statute. Damages are also recoverable in all personal actions, with the exception of actions upon statutes by common informers for penalties (a).

In most cases, damages are the sole object of the actions; in some, however, they are merely nominal.

In *assumpsit*, *covenant*, *case*, *trover*, and *trespass*, damages are the sole object of the action.

In *debt*, the damages are, in general, merely nominal, the recovery of the debt itself being the principal object of the action. In this case, the jury first find the matter of the issue; as, upon *nil debet*, that the defendant owes to the plaintiff the amount of the debt proved; upon *non est factum*, that the writing obligatory, &c. is the deed of the defendant; upon *solvit ad diem*, that the defendant did not pay, &c. &c.; and then they assess nominal damages (usually one shilling) for the detention of the debt. But in debt on articles of agreement, for a penalty (b), or on bonds conditioned for the performance of covenants or agreements, such as a bond for the performance of covenants contained in the same or in any other deed or writing (c), or for the payment of money by instalments (d), or for the payment of an annuity (e), or for the performance of an award (f), or for the performance of any other specific act (not being a bond for the payment of a sum of money in gross, at a certain time, as *post obit* bonds, &c. (g), or bond for the payment of money provided for by the 9 A. c. 16, s. 13) (h), or a *replevin* bond (i), or a bail bond (k), or the bond of a petitioning creditor (l), and where in pursuance of 8 & 9 W. 3, c. 11, s. 8, one or more breaches of the condition are assigned upon record, the jury first assess nominal damages for the detention of the debt, as above mentioned, and then assess actual damages upon the breaches assigned (m). In actions of debt upon records, the damages are only nominal (n); excepting in debt upon an inland judgment, where

(z) *Davila v. Herring*, 1 Str. 300; and see *Hankey v. Smith*, 3 T. R. 507, n.; *Buckle v. Hollis*, 2 Chit. Rep. 398.

(a) See Tidd, 9th ed. 870.

(b) *Drage v. Brand*, 2 Wils. 377.

(c) *Collins v. Collins*, 2 Bur. 824, 826, 2 Ld. Ken. 530, S. C.

(d) *Willoughby v. Swinton*, 6 East, 350, 2 Smith, 636, S. C.

(e) *Walcot v. Goulding*, 8 T. R. 126.

(f) *Welch v. Ireland*, 6 East, 613, 2 Smith, 666, S. C.

(g) *Murray v. Earl Stair*, 2 B. & Cres.

82, 89, 3 D. & R. 270, S. C.; 2 Camp. 285, n.

(h) *Cardozo v. Hardy*, 2 Moore, 220.

(i) 2 Saund. 187.

(k) *Id.*; and see *Moody v. Phasant*, 2 B. & P. 446.

(l) *Smith v. Broomhead*, 7 T. R. 300; *Smith v. Edmonson*, 3 East, 22.

(m) See 1 Saund. 58; 2 *Id.* 187; and see *M'Arthur v. Lord Seaforth*, 2 Taunt. 257; Chit. Forms, 178.

(n) See *Ven v. Phillips*, 1 Salk. 200; *Fanshawe v. Morrison*, 2 Ld. Raym. 1138.



interest may be recovered in the way of damages for the detention of the debt (*o*); and in some cases it has been allowed in an action on a foreign judgment, as for instance, in an action on an Irish judgment on a bond (*p*), interest has been allowed beyond the penalty. In debt on a recognizance of bail, they are not liable to interest on the sum recovered subsequent to the judgment (*q*). In debt on statute by an informer for a penalty, no damages whatever can be given; but the verdict, after finding the debt, immediately passes on to the assessment of the costs (*r*). But in debt for a penalty on a statute by a party grieved, damages are, in general, recoverable (*s*).

In *detinue*, the damages are merely nominal; but the jury find the value of the articles detained; and the judgment is, that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and the costs of increase.

In *replevin*, a verdict for the plaintiff gives damages precisely as in trespass; if the action be in the *detinet* (which is not a very usual form), these damages are calculated upon the value of the things taken, and the injury the plaintiff has sustained by the taking: if in the *detinuit* (which is the usual form), the damages are given for the injury the plaintiff has sustained by the taking only (*t*). If the verdict be for the defendant, damages are given as in a verdict for a plaintiff in trespass (*u*).

In *ejectment*, the damages are (unless the lessor of the plaintiff proceed under the 1 G. 4, c. 87) but nominal; the damage really sustained by the lessor of the plaintiff, by the detention of the property in dispute, &c. being now usually recovered in a separate action of trespass for mesne profits. (See *post*, Vol. 2, Book 3, Part 1, Chap. 1).

Where the defendant has given notice of set-off, but does not appear at the trial to give evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, deducting the amount of the set-off really due, with a special indorsement on the *postea* as a foundation for the Court to order a stay of proceedings, if another action should be brought for the amount of the set-off (*w*).

In a case in the Court of Common Pleas, where it was evident that the plaintiff had sustained some damage, the jury, not being able

(*o*) *Blackmore v. Fleming*, 7 T. R. 446; *Entwistle v. Shepherd*, 2 Id. 78; and see *M'Clure v. Dunkin*, 1 East, 436, 2 T. R. 388, S. C.; *Hilhouse v. Davis*, 1 M. & S. 169; *Wood v. Silletto*, 1 Chit. Rep. 473.

(*p*) *M'Clure v. Dunkin*, 1 East, 436; 2 T. R. 388, S. C.; and see *M. & M.* 223; *Arnot v. Redfern*, 3 Bing. 353; when not so allowed, see *Atkinson v. Lord Braybrooke*, 4 Camp. 380, 1 Stark. Rep. 319, S. C.; *Hilhouse v. Davis*, 1 M. & S. 173.

(*q*) *Waters v. Roes*, 3 Taunt. 503; *Welford v. Davidson*, 4 Bur. 2127.

(*r*) *Frederick v. Lookup*, 4 Bur. 2018; *Cuming v. Sibly*, Id. 2489.

(*s*) See *Powell v. Hord*, 1 Stra. 650, 2 Ld. Raym. 1411, S. C.; *Facy v. Lange*, Cro. Car. 559.

(*t*) This, in general, is only four guineas—the expenses of the *replevin* bond.

(*u*) See Chit. Forms, Book 3, Part 1, Chap. 2; and see *post*, Vol. 2, Book 3, Part 1, Chap. 2.

(*w*) *Laing v. Chatham*, 1 Camp. 252, 1 Chit. Rep. 178, n., S. C.

to ascertain the amount, were about to find a verdict for the defendant, when the plaintiff submitted to a nonsuit; but afterwards the Court, upon application, set aside the nonsuit, and ordered a verdict with nominal damages to be entered for the plaintiff (x).

*Where there are several defendants.*] We have already shortly pointed out when the verdict may be against one or more of several defendants (*ante*, 303). Where the defendants in trespass join in pleading, the jury, if they find them jointly guilty, cannot sever the damages (y). But they may find one of them guilty of the trespass at one time, and the other at another (z); or one of them guilty of part of the trespass or trover, and the other of another (a); or some guilty of the whole trespass, and the others guilty of part only (b); in all which cases the jury may assess several damages. Also, where the defendants plead severally, if they be found guilty of the same act of trespass, the jury cannot sever the damages (c); but the jury who try the first issue shall assess damages against all; and there shall be a *cesset executio* until the other issues are tried, when the other defendants, if found guilty, shall be contributory to those damages (d). Where the jury sever the damages by mistake, the plaintiff may cure the defect by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other (e); or by entering a *remittitur* as to the lesser damages, he may have judgment for the greater damages against both (f).

Where the plaintiff has judgment for damages against several defendants, he may levy the whole upon any one of them; and such defendant, if the action were *ex contractu*, may, after paying these damages, maintain an action against the other defendants, and oblige them to contribute their respective shares; but if the action were *ex delicto*, he cannot oblige the others to contribute, and is altogether without remedy (g). In a late case, however, it was held, that, if a party recover damages in case, against one of two joint coach-proprietors, for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, on proving that he was not personally present when the accident happened (h).

*Where there are several counts, &c.*] When the declaration contains several counts, the jury may assess either entire damages upon all or any of the counts, or several damages upon each (i). But it is a settled rule, that if a verdict be entered generally on all the counts,

(x) *Feize v. Thompson*, 1 Taunt. 121; see *Spencer v. Goter*, 1 H. Bl. 78.

(y) *Hill v. Goodchild*, 5 Bur. 2790; *Mitchell v. Milbank*, 6 T. R. 199.

(z) 11 Co. 5b.

(a) *Player v. Warn*, Cro. Car. 54.

(b) *Austin v. Willward*, Cro. El. 860.

(c) *Id.*; 11 Co. 6a, 7a.

(d) 11 Co. 6a, 7a.

(e) *Rodney v. Strobe*, Carth. 19; *Mis-*

*chell v. Milbank*, 6 T. R. 199, 200; *Dale v. Eyre*, 1 Wils. 306.

(f) *Johns v. Dodsworth*, Cro. Car. 192; *Sabin v. Long*, 1 Wils. 30.

(g) *Merryweather v. Nixan*, 8 T. R. 106; *Hart v. Biggs*, Holt, C. N. P. 245.

(h) *Wooley v. Batte*, 2 C. & P. 417; and see *Knight v. Hughes*, 3 C. & P. 467.

(i) 1 Ro. Abr. 570 (F), pl. 1.

and entire damages given, and one count be bad, it is fatal, and judgment shall be arrested (*k*); and it shall be arrested *in toto*, and no *venire de novo* awarded (*l*). However, where a general verdict has been taken, and evidence given exclusively on the good counts, the Court have permitted the verdict to be amended by the Judge's notes (*m*). So, where it appears by the Judge's notes, that the jury calculated the damages on evidence applicable to the good counts only, the Court will amend the verdict by entering it on those counts, though evidence was given applicable to the bad counts also (*n*). The Court, however, have refused to entertain an application for entering the verdict upon particular counts, according to the evidence on the Judge's notes, after a lapse of eight years, and after the judgment had been reversed in error for a defect in one count (*o*). And in a penal action, where the jury found a verdict for one penalty, on evidence equally applicable to each of two counts, and the plaintiff applied it to one of the counts, which was subsequently found to be bad, the Court would not allow him afterwards to enter it up on the other (*p*). In order, therefore, to avoid difficulty or error in this respect, care should be taken to enter the verdict on the good counts only; which may be done either at the trial, or by application to the Judge at chambers, who tried the cause; the Court also will compel the plaintiff to elect on which counts he will enter his verdict, in the next term after the trial (*q*). Even a misjoinder of counts may be remedied in this manner; as where assumpsit and trover are joined, and a general verdict given, you may remedy the error by entering the verdict on the count in assumpsit or the count in trover (*r*).

In actions for words, if the words be set forth in one count, and some of them be actionable and others not, entire damages may be given; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation (*s*). But if the declaration consist of several counts, and all the words in any of them be not actionable, and if special damage be not laid, or, if laid, not proved, then if a general verdict be given on all the counts, and entire damages given, it will be bad, and the defendant may either move in arrest of judgment, or bring a writ of error (*t*).

Where a declaration in trespass contained two counts, and the de-

(*k*) *Grant v. Astle*, 2 Doug. 730; *Cook v. Cor*, 3 M. & S. 110; *Willes*, 443.

(*l*) *Tretor v. Wall*, 1 T. R. 151; *Hancock v. Haywood*, 3 Id. 435; *Holt v. Scholefield*, 6 Id. 691.

(*m*) *Eddowes v. Hopkins*, 1 Doug. 376.

(*n*) *Williams v. Breedon*, 1 B. & P. 329; see *Spencer v. Goter*, 1 H. Bl. 78; 2 Saund. 171 a; *Spicer v. Teusdale*, 2 B. & P. 49.

(*o*) *Harrison v. King*, 1 B. & Ald. 161, 4 Price, 46, S. C.

(*p*) *Holloway v. Bennett*, 3 T. R. 448;

*Hardy v. Cathcart*, 5 Taunt. 2, 1 Marsh. 180, S. C.; *aliter* in an information by attorney-general, 10 Price, 9.

(*q*) *Lee v. Mugeridge*, 5 Taunt. 36.

(*r*) MS. E. 1814; *Rightly v. Birch*, 2 M. & S. 533.

(*s*) 1 Ro. Abr. 576, (F), pl. 1; *Broughton's case*, Moore, 142, 143, 708; *Brooke v. Clarke*, Cro. El. 328; *Tharbie v. Smith*, Id. 788; 1 Bulst. 37.

(*t*) 2 Saund. 171 c; *Lloyd v. Morris*, *Willes*, 443; 3 Bac. Abr. 7; and see *Cook v. Cor*, 3 M. & S. 110.

fendant pleaded to one, and suffered judgment by default on the other, and, on the trial of the former, the plaintiff could only prove one act of trespass, which was covered by the second count, the Court held that he was not entitled to a verdict on the first count (*u*).

*In what cases limited.*] As to the measure of the damages, it must be observed that where there is a penalty expressed for the non-performance of a contract, and it appears evident that such penalty is the precise sum fixed and agreed upon between the parties as liquidated damages for the non-performance of the contract, the jury are confined to that sum; as in an action on a bond for 1000*l.*, conditioned that the defendant should marry the plaintiff, the Court held that if the jury found a verdict for the plaintiff, they could not give more or less damages than the 1000*l.* (*x*). But where it does not appear clear that the parties intended the sum stated in the agreement, as liquidated damages, it must then be deemed a mere penalty; in which case, although the jury cannot exceed that sum, yet they may find a less sum as the measure of the damage the plaintiff has sustained (*y*). Therefore, in an action upon an agreement to serve the plaintiff in a certain capacity for four years, under the penalty of 50*l.*, the Court held that the jury could not give damages beyond the penalty, but within that sum they might give the party any compensation to which he could prove himself entitled (*z*). In debt against a sheriff or gaoler for the escape of a prisoner in execution, the jury cannot give a less sum than the creditor would have recovered against the prisoner, viz. the sum indorsed on the writ, with the legal fees and expenses of the execution (*a*). In trover by the assignees of a bankrupt against the sheriff, to try the validity of a sale under an execution, the jury may, and often do, consider the sum at which the goods were actually sold, after deducting the expenses of sale, as a fair measure of damages (*b*). In all other cases, the jury are at liberty to give what damages they may think proper, proportioned to the degree of injury they may judge the plaintiff to have sustained from the tort or breach of contract complained of. And in an action for seduction, in ascertaining the damages, they are not obliged to confine themselves to such a sum as would be a sufficient compensation for the mere loss of service complained of; but they may also allow damages for the injury sustained by the daughter in her reputation and prospects in life, by the seduction (*c*). On the other hand,

(*u*) See *Compere v. Hicks*, 7 T. R. 727.

(*x*) *Love v. Peers*, 4 Bur. 2225; and see *Barton v. Glover*, Holt, C. N. P. 43.

(*y*) See *Astley v. Weldon*, 2 B. & P. 346; *Smith v. Dickenson*, 3 Id. 630; *Davies v. Penton*, 6 B. & Cres. 216; *Kemble v. Farren*, 6 Bing. 141, 3 C. & P. 624 (*a*), S. C.; *Jones v. Green*, 3 Y. & J. 298; *Charrington v. Laing*, 6 Bing. 242; *Reilly v. Jones*, 8 Moore, 244, 1 Bing. 302, S. C.; Tidd,

9th ed. 876.

(*c*) *Wilbeam v. Ashton*, 1 Camp. 78.

(*a*) *Bonafous v. Walker*, 2 T. R. 126; *Robertson v. Taylor*, 2 Chlt. Rep. 454; *Hawkins v. Plomer*, 2 Bla. Rep. 1048.

(*b*) *Whitehouse v. Atkinson*, 3 C. & P. 344; and see *Glaspoole v. Young*, 9 B. & Cres. 696.

(*c*) See *Edmonson v. Machell*, 2 T. R. 4; and the cases in Rosc. Ev. 367.

it is a general rule that the jury cannot take into consideration, in mitigation of damages, any fact or circumstance not pleaded, which could and should have been pleaded as a defence to the action (*d*). It is also a general rule, that the jury can in no case exceed the damages laid in the declaration (*e*); and it is the duty of the clerk of *nisi prius*, if the jury by mistake find a verdict for greater damages, to enter it for the amount laid in the declaration merely (*f*). If entered, however, for more, the mistake may be rectified by application to the Court, who will allow the plaintiff to enter a *remittitur* for the excess (*g*); and the Court have ordered their judgment to be amended in this respect, even in a subsequent term (*h*). Or the Court, in such a case, will, if the plaintiff wish it, grant a new trial, and allow the declaration to be amended (*i*).

It also seems to be an established principle, that where it is positively and expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, or previous to his having any right of action, and the jury give entire damages, judgment shall be arrested; but where the cause of action is properly laid, and the other matter (shewing a continuance of the injury after the commencement of the action, &c.) either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment (*j*).

In actions against persons for having seized goods, &c. by virtue of any law relating to the customs and excise, where the plaintiff obtains a verdict, if the Judge who tries the cause certify that there was probable ground for the seizure, the plaintiff, besides the thing seized, or the value thereof, shall not be entitled to more than 2*d*. damages, nor to any costs of suit. (28 *G. 3*, c. 37, s. 24. and see 7 & 8 *G. 4*, c. 53, s. 119) (*k*).

Also, in actions against justices of peace, on account of any conviction made by them, or for any thing done by them, or by them commanded to be done for the levying of any penalty, apprehending of any party; or in the carrying of any such conviction into effect, the plaintiff shall not recover more than 2*d*. damages, (over and above the amount of any penalty levied upon him, if any levy have been made,) nor any costs of suit whatever, unless it be expressly alleged in the declaration that such acts were done by the defendant without any reasonable and probable cause; nor shall the plaintiff be entitled to recover the amount of any penalty levied, or any damages or costs whatsoever, if it be proved at the trial that he was guilty of the of-

(*d*) See *Watson v. Christie*, 2 B. & P. 224, and the cases in *Rosc. Ev.* 298, 299.

(*e*) *Cheveley v. Morris*, 2 W. Bl. 1300.

(*f*) MS. M. 1814.

(*g*) *Pickwood v. Wright*, 1 H. Bl. 643; and see *Cheveley v. Morris*, 2 W. Bl. 1300, and *post*, Vol. 2, Book 4, Part 1, Chap. 26.

(*h*) MS. M. 1814.

(*i*) *Tomlinson v. Blacksmith*, 7 T. R. 132.

(*j*) 2 Saund 171 a, b.

(*k*) See *Balkin v. Tankard*, 1 H. Bl. 28; *Laugher v. Brist*, 5 B. & Ald. 762, 1 D. & R. 417, S. C.

fence for which he was convicted, &c., and that he had undergone no greater punishment than is assigned by law for such offence. (43 G. 3, c. 141. See *post*, Vol 2, Book 3, Part 2, Chap. 11).

• Double and treble damages are in some cases given by particular statutes; but at common law the damages are always single. Double and treble damages mean double and treble the damages actually given by the jury, and are not reckoned in the same manner as double or treble costs (*l*).

*When increased, &c.*] In actions for mayhem (*m*), and perhaps also in the case of an atrocious battery, where the injury to the party remains visible, and the damages given by the jury are inadequate (*n*), the Court, upon inspection of the plaintiff, may increase the damages which the jury have given. This, however, is very rarely done. And in other cases the Court have refused to amend the *postea*, by increasing the damages given by the jury, although all the jurymen joined in an affidavit, stating their intention to have given such increased damages, and that they conceived their verdict was calculated to give them (*o*). The proper time for explanations of this kind is at the trial (*p*).

In what cases the Court will reduce the damages, see Vol. 2, Book 4, Part 1, Chap. 27, tit. "New Trial."

(*l*) *Buckle v. Beves*, 4 B. & C. 154, 6 D. & R. 1, S. C. See Vol. 2, Book 4, Part 1, Chap. 30, tit. "Costs."

(*m*) *Brown v. Seymour*, 1 Wils. 5; *Cooke v. Beale*, 1 Ld. Raym. 176, 3 Salk. 115, S. C.

(*n*) *Hardres*, 408; *Cooke v. Beale*, 1 Ld. Raym. 176, 3 Salk. 115, S. C.

(*o*) *Jackson v. Williamson*, 2 T. R. 281.

(*p*) *Id.*

## CHAPTER IV.

## PROCEEDINGS FROM THE POSTEA, TO THE ENTRY OF SATISFACTION ON THE RECORD, INCLUSIVE.

## SECT. 1.

*The Postea.*

THE *postea* is the indorsement on the *Nisi Prius* record, purporting to be the return of the Judge before whom a cause is tried, of what had been done in respect of such record. It states the day of trial, before what Judge the cause is tried, and also who is, or was, the associate of such Judge. It also states the appearance of the parties by their respective attornies, or their defaults; it also states the summoning and choice of the jury, whether those who were originally summoned, or those who were *tales*, or taken from amongst the standers-by; it then states the finding of the jury upon oath; and, according to the description of action, it further states the assent of the damages, together with the occasion thereof, together with the costs. Except in special jury causes, it is seldom necessary to state in the *postea*, that part of the jury was taken from the standers-by. In special jury causes, this is not uniformly the case.

At the trial, the associate makes minute of the verdict or nonsuit in the panel, from which the *postea* is afterwards made, and if the cause were tried in London or Middlesex, the associate will deliver the record of *Nisi Prius*, with the *distringas* and panel annexed, to the attorney of the party for whom the verdict was given; and the defendant's attorney, in the plaintiff's case, receives, and the attorney must afterwards indorse the *postea* upon it from the associate's minutes in the panel. But if the cause were tried at the assizes, and the Judge do not certify that the party recovering shall be forthwith executed to execution, in pursuance of 1774, c. 1, s. 70, the associate will, himself, indorse the *postea* and deliver it at the next assizes of the following term, to the attorney or agent of the party entitled to it, as above mentioned, for which the associate is paid at the trial, 2s. 1d. 6d. for a verdict for the plaintiff, 1s. 1d. for a verdict for the defendant, and 2s. 1s. for a nonsuit. If, however, the Judge does not certify in pursuance of the statute, then the

associate will immediately deliver the record of *Nisi Prius*, and the attorney will indorse the *postea* on it, as in causes tried in London or Middlesex. The attorney should take the *postea* to the clerk of the *postea*s, and get it marked "*deliberatur*," for which pay him 6*d*. This may be done at any time before the costs are taxed (a).

If the trial was had before the sheriff or his deputy, or the Judge of an inferior court, in pursuance of the 3 & 4 *W. 4*, c. 42, (*ante*, 286 *b*), in a cause wherein the demand did not exceed 20*l*., instead of a *postea*, the verdict will be indorsed on the writ upon which the trial is had, and signed and sealed in the name of the sheriff and by the jurors, and the sheriff, &c. will, on the return of the writ, deliver it so indorsed to the successful party who applies for it.

The *postea* may be amended, if erroneous. (*See Vol. 2, Book 4, Part 1, Chap. 28, p. 846*). Also, where the *postea* was lost, the Court ordered a new one to be made out from the issue roll and from the associate's notes (b). If an amendment was allowed on the trial, under the 3 & 4 *W. 4*, c. 42, s. 13, (*ante*, 286 *a*), the order for such amendment must be indorsed on the *postea* or the writ on which the trial was had, and returned with the record or writ, and thereupon the papers, rolls, and other records of the Court, as it may be necessary to amend, should be amended accordingly. And if the trial was had in a Court of record, then the order for the amendment must be entered on the roll or other document upon which the trial was had. (3 & 4 *W. 4*, c. 42, s. 13.)

(a) See the various forms of *postea*s,  
Chit. Forms, 177 to 188.

(b) *Dayrell v. Bridge*, 2 Str. 1264.



## SECT. 2.

*The Judgment.*

*What.*] The judgment is the sentence of the law, pronounced by the Court, upon the matter contained in the record; viz. in the case of a verdict for the *plaintiff*, the judgment is that he recover his damages and costs, in an action of *assumpsit*, covenant, case, trespass, and *replevin*; or his debt, damages, and costs, in an action of *debt*; or his goods, or their value, and damages and costs, in an action of *detinue*, together with the costs of increase:—or if the verdict be for the *defendant*, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence; and in *replevin*, the judgment at common law for the defendant is, also, that he have a return of the goods, or on the statute 17 Car. 2, c. 7, for the arrears of the rent and costs. The judgment as to the *increased costs* is grounded on the statute of Gloucester, 6 Ed. 1, c. 1, s. 2; and as to the *damages*, &c. and *common costs*, it is founded on the verdict (c).

*In what time to be signed, after a trial at Nisi Prius, when the Judge does not certify for immediate execution.*] Formerly, when a general verdict was given at *Nisi Prius*, the party for whom it was given must, in this Court, on or after the day in bank, that is, on or after the return day of the *distringas*, (where the trial had been had at the sittings in term), or on or after the first day of the next term, (if the cause has been tried in the vacation), have entered a *rule for judgment nisi causa* with the clerk of the rules, and waited the four days limited by it before he could sign final judgment. This rule was also necessary after the execution of a *writ of inquiry*, either on a demurrer or a judgment by default (d), or where a general verdict was given subject to an award (e). But it was not required after a *special verdict*, in which case the prevailing party might, as he may now, proceed to sign judgment, ~~fix~~ his costs and sue out execution, immediately after the decision of the Court, without any rule for judgment (f); nor was it ever necessary after a *nonsuit*, for the judgment in that case might, as it now may be, signed immediately after the day in bank. (*R. E. 5 G. 2. r. 3, a*). And now by the late rule of Court of *H. T. 2 W. 4, r. 67*, after a *verdict* or *nonsuit*, judgment may be signed on the day after the appearance day (i. e. the fourth day after the return day) of the *distringas*, without any rule for judgment: also after the return of a *writ of inquiry*, judgment may be

(c) See the various forms of judgment for plaintiff, *Chit. Forms*, 192 to 203, and of a judgment for defendant, *Id.* 204.

(d) *Clerk v. Rowland*, 1 Salk. 309.

(e) *Hayward v. Ribbans*, 4 East, 310.

(f) 1 Bur. in Pref. iv.

signed at the expiration of *four days* from such return, without such rule (g).

At any time within the four days, after the day in bank, that is to say, within the first four law-days on which the Court actually sit, after the return day of the *distringas* (h), if there be so many in term, and if not, then on or before the last day of the term, the party against whom the verdict is given may move for a new trial, (*post*, Vol. 2, Book 4, Part 1, Chap. 27), and if that be refused, he may then move in arrest of judgment, provided indeed he so move within four days after the trial, if there be so many days in the term, and at all events within the term in which the *distringas* is returnable; (*R. II. 2 IV. 4, r. 65*) (i); but if he do not so move, or if he move and a new trial be refused, or judgment be not arrested, the prevailing party may, *at any time after the fourth day*, sign judgment, tax his costs, and proceed to sue out execution. (*R. E. 5 G. 2, r. 3, a*) (j).

The party entitled to the judgment may postpone the signing it as long as he pleases. It is not, it seems, necessary to give a term's notice previous to signing the judgment where four terms or more have elapsed since the trial; the rule requiring a term's notice applying only to cases where the matter is still in controversy, and where the plaintiff's neglect to proceed in the cause has occurred before verdict (k).

*In what time to be signed after a trial at Nisi Prius, when the*

(g) When this rule was in practice, it was not necessary to give a term's notice previously to entering the rule, where four terms or more had elapsed since the trial; the rule requiring a term's notice applying only where the plaintiff's neglect to proceed in the cause has occurred before verdict. (*May v. Wooding*, 3 M. & Sel. 500). Also, if a rule for judgment were given, and judgment was not signed of the term the rule was entered, it was not necessary afterwards to enter another rule of the same term as the judgment. (*Roper v. Fisher*, cor. *Bayley*, J., 10th Dec. 1823).

The rule for judgment expired in four days, exclusive of the day on which it was entered; and Sunday, (*Roberts v. Stacey*, 13 East, 21), or any other day (*Bromley v. Foster*, 1 Chit. Rep. 562) on which the Court did not sit, was not accounted, unless the rule were entered on the last day of the term, or within four days after it. (*R. E. 5 G. 2, r. 3, (a)*; 3 Salk. 212; *Standfast v. Chamberlain*, Id. 215; *Clerk v. Rowland*, 1 Id. 399). When the term ended before the expiration of these four days, judgment, in that case, might be signed on the last day of the term; (*Anon.* 1 Salk. 77; *Thomas v. Ward*, 2 B. & P. 393); and indeed the rule itself might be entered on the last day of the term, or within four days

after it; and if entered within the four days after term, it was usual in practice to enter it as of the last day of term; in either of which cases, upon the fifth day after the last day of term, judgment might be signed as of that term. (*R. E. 5 G. 2, r. 3, a*).

(h) *Per Buller, J., Lee v. Carlton*, 3 T. R. 642; *Kirkman v. Marten*, 2 B. & Ald. 613, 1 Chit. Rep. 382, S. C.; and see *Mason v. Clarke*, 1 Dowl. P. C. 288, 1 C. & J. 411, S. C. Under particular circumstances, the Court may allow a new trial to be moved for after this time, if judgment has not been actually signed. See *Rex v. Gough*, 2 Doug. 797; and see *Rex v. Holt*, 5 T. R. 436; and further, *post*, Vol. 2, Book 4, Part 1, Chap. 27.

(i) *Lee v. Carlton*, 3 T. R. 642.

(j) See *Blanchenay v. Vandenberg*, 1 B. & B. 298, 3 J. B. Moore, 643, S. C., where the plaintiff's attorney obtained a *postea* from the associate in C. P. on the morning of the *quarto die post*, under the pretence of having it stamped, but instead thereof signed judgment immediately and issued execution thereon; the Court set aside the judgment and execution, and ordered that the associate should not in future deliver over the *postea* until the morning after the *quarto die post*.

(k) *May v. Wooding*, 3 M. & Sel. 500.

*Judge certifies for immediate execution.*] Formerly, as we have just seen, if the cause was tried and a verdict obtained, in vacation, the judgment and execution were, in all cases, delayed by reason of the interval between the terms; for the four-day rule for judgment, (which was, in all cases of a general verdict, necessary to have been entered, and to have expired previously to the judgment), could not have been so entered, until on or after the first day of the next term. Also, in the case of a nonsuit in vacation, judgment could not in any case have been signed, until on or after the first day of the next term. (*See ante*, 316). But now, by the 1 W. 4, c. 7, s. 2, it is enacted, that "in all actions brought in either of the said Courts, by whatever form of process the same may be commenced, it shall be lawful for the Judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to *certify under his hand (l), on the back of the record, at any time before the end of the sittings or assizes, that, in his opinion, execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject, or not, to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the postea (l), with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of distringas juratores, or habeas corpora juratorum, may not be returnable after such day: provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof.*"

Sect. 3, enacts, "That every judgment to be signed by virtue of this act may be entered and recorded as the judgment of the Court wherein the action shall be brought, although the Court may not be sitting on the day of the signing thereof; and every execution issued by virtue of this act shall, as if signed, may bear teste on the day of issuing thereof; and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law."

Sect. 4, provides, "That notwithstanding any judgment signed or recorded, or execution issued, by virtue of this act, it shall be lawful for the Court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the Court may think fit to direct (n).

(l) See a form, Chit. Forms, 188.

(n) See *Buddley v. Oliver*, 1 Dowl. P. C. 598; in which case it was held,

that where a Judge at the assizes, in pursuance of the above provisions of the 1 W. 4, c. 7, orders that the plaintiff

Sect. 5, provides, "That nothing in this act contained shall be deemed to frustrate or make void any provision relating to the issuing of any writ of *habere facias possessionem*, contained in the act passed in the first year of the reign of his present Majesty, intituled 'An act for the more effectual administration of justice in England and Wales.'"

It should seem, that although the above statute mentions that a rule for judgment may be given before final judgment is signed, yet that since the rule of *H. T. 2 W. 4, r. 67, ante, 316*, no such rule need be given (*o*). But still the time which used to be given by that rule must have expired before you can sign judgment, and that time is four days from the day of granting the certificate, one day exclusive, and the other inclusive.

The practice as to moving the Court to vacate the judgment, or stay or set aside the execution, or arrest the judgment, or grant a new trial, is the same in this as in other cases. (*See ante, 316, 317*).

*When to be signed after a trial before the sheriff, &c. under the 3 & 4 W. 4, c. 42.]* By the 18th section of that act it is enacted, "That, at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued *forthwith*; unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or Judge before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at Nisi Prius; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at Nisi Prius." If, therefore, the sheriff, &c. does grant this certificate, and no order is made by a Judge to delay judgment, such judgment may be signed and execution issued at the expiration of four days from the return of the writ, one day exclusive, and the other inclusive. If the sheriff grant this certificate, the defendant must move the Court within the first four days of the term after the trial, if it was had in vacation, or if it was had in term, then within the next four days in the term, if there be so many, and if not, then on or before the last day, for a new trial; and in default of his doing so, the plaintiff may then sign his judgment, and issue execution. If a Judge order the judgment to be stayed until a day named by him, then of course it cannot be signed until after that day.

shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the next term to the Court above, to

enter a suggestion to deprive the plaintiff of costs.

(*o*) See Jervis's Rules, xxx, n.; *Anon* E. T. 1832.

*How signed and costs taxed.*] If the Judge does not certify for immediate execution, under the 1 W. 4, c. 7, then on or after the appearance day of the return of the *distringas*, get the record of *Nisi Prius* from the associate, and enter the *postea* on it, in a town cause. Or, in a country cause, the associate will enter the *postea* before he gives you the record, as already mentioned (*ante*, 314). Take it to the clerk of the *postea*s, who will mark it "*deliberatur*;" pay him 6d. Formerly, the attorney was obliged to get the *postea* marked within two days after he received it; (*R. T.* 2 J. 1, r. 2); but this rule is not observed at present, and it is usually marked any time before the costs are taxed. Having thus got the *postea* marked, take it, together with all the papers and briefs, &c. in the cause, to the master, who will tax the costs and sign judgment.

If the Judge certifies for immediate execution, then on or after the expiration of the four days above named get the record of *Nisi Prius* from the associate, and enter the *postea* on it. Take it to the clerk of the *postea*s and get it marked as above mentioned, and then take it with all the papers and briefs, &c. in the cause to the master, who will tax the costs and sign judgment as in other cases. The 1 W. 4, c. 7, s. 6, provides that the master shall not be compelled to attend and tax costs at any time between the last day of August and the 21st October, in cases where the Judge thus certifies for immediate execution.

If the trial was had before the sheriff or a Judge of an inferior court for a demand not exceeding 20*l.*, according to the 3 & 4 W. 4, c. 42, *ante*, 286 b, then, on or after the expiration of the four days above named, or in case of the sheriff or other officer having certified, or a Judge having made an order to prevent your having immediate judgment, then, on or after the expiration of the time allowed for your signing judgment, call at the sheriff's office, and he will deliver to you the writ and his return, with the finding of the jury indorsed thereon. Take the writ and return, together with all the papers and briefs, &c. in the cause to the master, who will tax the costs and sign judgment.

The master will tax the costs, upon a view of the proceedings. But if there be *extra* expenses incurred, which do not appear upon the face of the proceedings, such as witnesses' expenses, fees to counsel, attendances, court fees, &c. an affidavit must be made of these *extra* costs, otherwise the master will not be warranted in allowing them (*p*). Such affidavit should be left at the master's office one clear day before the day appointed for taxation (*q*). If such affidavit be made before a commissioner in the country (as it usually is in country causes), you must, in a convenient time before the taxation, file it with the clerk of the rules, who will make out a copy of it for you, to lay before the master; pay him 8d. per sheet. It is usual also, among fair practitioners, to send a copy of it to the opposite attorney (*r*).

In fair practice it was always usual to give notice of taxation, with-

(p) See forms of the affidavit, Chit. Forms, 189, 190.

(q) Chappin. Prac. 156.

(r) In the Exchequer, by rule M. T.

1830, a copy of the bill of costs and affidavit of increase must be delivered to the opposite attorney one day previous to the taxation.

out being ruled to do so. And now, by the rule of *T. T. 1 W. 4, r. 12, before taxing the costs, the prevailing party must give the opposite party one day's previous notice of taxation(s)*; and if he does not give it, the judgment would be irregular (*t*). A service of the notice at any time before nine o'clock at night for the next day, would suffice. If the opposite party, however, wishes a longer notice, he should obtain from the clerk of the rules a rule to be present at the taxation; pay 1s. 6d.; serve a copy of it on the attorney of the prevailing party before the time for signing judgment has expired; the latter must then give twenty-four hours' previous notice of taxing costs; and if the costs are taxed without such notice, the taxation would be irregular, and the attorney liable to an attachment; but if this rule to be present is not served until the time for signing judgment has expired, he is not obliged to give more than the above one day's notice, which, as we have just seen, may be given at any time before nine at night for the next day (*u*). It may be as well here observed, that this notice of taxation, or the first appointment made by the master, is *peremptory*, and he will proceed *ex parte* thereon, unless sufficient cause is shewn for the postponement. (*See R. II. 32 G. 3*).

If the plaintiff's attorney will waive the recovery of costs from the defendant, it seems, that, notwithstanding the defendant should obtain a rule to be present, the plaintiff might, at the expiration of the time allowed for that purpose, without giving any notice of taxation, sign judgment and issue execution; and this, when the debt is large, is sometimes expedient (*v*).

It may be here observed that the master is in general the sole judge as to what witnesses shall be allowed on taxation, and as to the mode of taxing costs; and the discretion used by him in taxation, will not be brought into review before the Court as a matter of course. (*Ante*, 248, 249).

If the attorney of the opposite party attend the taxation, he thereby waives all irregularity as to the time of signing judgment (*x*).

When the costs are taxed, final judgment is then said to be signed (*y*); and the prevailing party may immediately proceed to sue out execution.

See further as to when and in what cases the plaintiff or defendant is entitled to costs, *post*, Vol. 2, Book 4, Part 1, Chap. 30.

*Form of.]* In the case of a verdict for the plaintiff, the judgment, as we have seen, *ante*, 316, is, that he recover his damages and costs in an action of *assumpsit*, covenant, case, trover, trespass, and *replevin*; or his debt, damages and costs in an action of debt; or his goods or their value, and damages and costs, in an action of *detinue*; and in either case also his costs of increase; or if the verdict be for

(s) See the form, Chit. Forms, 192. The reasonable costs of this notice will be allowed. *Thorp v. Wordy*, 2 C. & J. 408, 1 Dowl. P. C. 575, S. C.

(t) See *Perry v. Turner*, 2 C. & J. 89; *Routledge v. Giles*, Id. 163.

(u) See 1 Sellon, 504.

(v) See *Somerville v. White*, 5 East, 146; *Doe d. Messiter v. Dynelay*, 4 Taunt. 289; Chit. Sum. Prac. 195, Tidd, 1944.

(x) Tidd, 9th ed. 930.

(y) See *Butter v. Bulkeley*, 8 Moore, 4, 1 Bingham, 233, S. C.

the defendant, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence; and in *replevin* the judgment at common law, for the defendant, is so that he have a return of the goods, or on the statute 17 Car. 2, c. 7, for the arrears of the rent and costs. The judgment as to the increased costs is grounded on the statute of Gloucester, 6 Ed. 1, c. 1, s. 2; and as to the damages, &c. and common costs, it is grounded on the verdict (z).

A *capiatur pro fine* or *misericordia* also forms a part of the judgment. If the verdict be for the defendant, the plaintiff and his pledges (if any) (a), are adjudged to be amerced (nominally) for his false claim: but if the verdict be for the plaintiff, then—in all actions *vi et armis*, or where the defendant in his pleading has falsely denied his own deed, the judgment contains an award of a *capiatur pro fine* (b); in all other cases the defendant is adjudged to be amerced (c). This *capiatur* or *misericordia* always formed a part of the judgment at common law; and the produce of it formed no inconsiderable proportion of that part of the king's revenue arising from his courts of justice. But this has long ceased to be the case. The *misericordia* or amercement has long been merely nominal, and not enforced. In actions of trespass and ejectment, a *capias pro fine* used to issue in pursuance of the *capiatur*, and the defendant was obliged to compound the fine, by paying some small sum to the master, until, by stat. 5 W. & M. c. 12, it was enacted that no *capias pro fine* should thereafter issue in actions of "trespass, ejectment, assault or false imprisonment," brought in any of the Courts at Westminster; but that the plaintiff should pay 6s. 8d. to the master in satisfaction of the said fine, at the time of signing the judgment, and should be allowed the same in his costs. Since this statute, the *capiatur* is omitted altogether in the judgment, in the actions mentioned in the above statute (d); but, in all other cases, where it was necessary at common law, it should now in strictness be added in the judgment. At common law, also, the omission of a *capiatur* or *misericordia* was error; but by stat. 16 & 17 C. 2, c. 8, the omission of either, or the entering of one for the other, shall not be cause for reversing any judgment in the Courts of Westminster, or counties palatine, after verdict, or confession by *cognovit actionem* or *retracta verificatione*, or (by stat. 4 A. c. 16, s. 2) on *nil dicit* or *non sum informatus*, and writ of inquiry executed thereon; and these statutes have been holden to extend to the case of adding a *capiatur*, where there should have been none (e). Also

(c) See *post*, Vol. 2, 854, as to the costs. See the various forms of judgment for plaintiff, Chit. Forms, 192 to 203, and of judgment for defendant, Id. 204.

(a) These pledges are now wholly dispensed with, and omitted in actions commenced by writs of *capias*, *summons*, or *detainer*.

(b) 8 Co. 59; 11 Co. 43; *Linsey v. Clerk*, 5 Mod. 285, 1 Salk. 54, S. C.; F. N. B. 121; Co. Lit. 131; 1 Ro. Abr. 219.

(c) See *Myddleton v. Wynn*, Willes, 600; *Humble v. Bland*, 6 T. R. 255.

(d) *Linsey v. Clerk*, 1 Salk. 55, Carth. 390, S. C.; *Westbrooke v. Andrews*, 2 L. R. 227.

(e) *Westbrooke v. Marshall*, 1 Str. 313.

it has been holden, that where the plaintiff was by mistake adjudged to be in *misericordia* instead of the *defendant*, it was no cause of error (z).

A mere miscalculation of the damages recovered will not avoid the judgment (a).

If the costs be omitted in the judgment, either party may assign it as error, even although the omission be to his advantage (b). But by 16 & 17 C. 2, c. 8, no judgment after verdict in any action, or after a nonsuit in *replevin*, shall be reversed, because the increased costs are not entered to be at the request of the party for whom the judgment is given, or that the costs in any action are not entered to be by consent of the plaintiff (c). As to costs, generally, see *Vol. 2, Book 4, Part 1, Chap. 30*.

*Relation of judgments.*] As far as relates to purchasers *bond fide* for a valuable consideration, a judgment affects the lands, tenements, and hereditaments of the party, only from the time it is signed; to ascertain which, the master, in signing the judgment, must mention on the record the time of signing it; and the same shall be stated in the margin of the judgment roll, when the judgment is entered. (29 C. 2, c. 3, ss. 13, 14, 15; extended to the counties palatine by 8 G. 1, c. 25, s. 6) (d). But as to all other persons but purchasers, the judgment, (when not signed by leave of the Judge under the statute 1 W. 4, c. 7, ante, 316), as it affects lands, relates, it should seem, to the first day of the term of which it is signed (e), in the same manner as at common law (f); and it affects, as well lands held in trust for the defendant, as those of which he is actually seised. (29 C. 2, c. 3, s. 10) (g). But copyhold lands are not bound by it (h).

As to chattel property, the judgment does not affect it in the hands of the defendant; chattel property being bound only by the delivery of the writ of execution to the sheriff. (29 C. 2, c. 3, s. 16) (i).

It may as well be observed, that, by bringing an action of debt on a judgment, the lien created by the judgment is not thereby waived (k).

*When and how entered, docketed, &c.*] As soon as judgment is signed by the master, the party, in whose favour it is given, may immediately sue out execution, before the judgment is entered on the roll, or docketed. The judgment, however, must be entered on the roll, docketed, and carried to (l) and filed in the treasury of the

(z) *Pullin v. Stokes*, 2 H. Bl. 312.

(a) *Dunn v. Crump*, 7 Moore, 137, 3 B. & B. 309, S. C.

(b) 1 Ro. Abr. 759, pl. 1—4, 760, pl. 5; 4 Leon. 61; Jenk. 211, pl. 48.

(c) See the various forms of judgments, Chit. Forms, 192, &c.; and see *Spicer v. Teasdale*, 2 B. & P. 49.

(d) See *Hugh v. Robinson*, 1 T. R. 118; *Savil v. Wiltshire*, Willes, 428, n.

(e) *Whitaker v. Whitaker*, 8 B. & C. 768; and see *Wansey v. More*, 5 T. R.

65; *Greenway v. Fisher*, 7 B. & C. 436; *Haswell v. Thorowgood*, Id. 705.

(f) 30 E. 3, 24; 1 Ro. Abr. 892, pl. 12 to 16; 2 Inst. 395; Bro. Elegit, 17, 19; 2 Saund. 9, (n).

(g) 2 Saund. 10 a, (n. 17).

(h) 1 Roll. Abr. 888; and *Tidd*, 9th ed. 935.

(i) See Godb. 161; 8 Co. 171.

(k) *Erby v. Erby*, 1 Salk. 80.

(l) See *Barrow v. Croft*, post, 323.



Court, 1. in order to bind the defendant's lands; 2. to enable the plaintiff to bring debt or *scire facias* on the judgment; 3. to proceed against the bail on their recognizance; 4. in case a writ of error is brought; and 5. in order to bind assets in the hands of the executor or administrator of the defendant. (*See post*, 323). Formerly, it was requisite to enter the proceedings of record in order to charge the defendant in execution, but this is no longer the case. (*R. H. 2 W. 4, r. 95*). In all other cases, also, by *R. E. 17 J. 1*; *E. 1657, r. 1*; *M. 5 A. r. 1*, the judgments are ordered to be docketed; and by *R. M. 5 A. r. 1*, *E. 5 W. 3*, *E. 9 W. 3*, *M. 9 W. 3*, *T. 10 W. 3*, the rolls of Trinity, Michaelmas, and Hilary terms, are ordered to be brought in before the *essoign* (*m*) days of the subsequent terms, respectively, and the rolls of Easter term before the first day of Trinity; after which they are not to be received, without the special leave of the Court, and the *custos brevium* usually attends two days before every term, to receive and file the rolls which ought to be so carried in. No great attention, however, seems to be paid to these rules, as they are merely directory; and rolls are now received after the time mentioned in them, without the leave of the Court, upon paying a *post terminum* of 4s. 8d. to the officer. In a late case, the Court refused to order a judgment-roll to be taken off the file, although it had not been carried in for twenty-four years after the judgment, it appearing that the judgment had been marked by the proper officer at the time of signing the same, and had been then regularly docketed, so as to affect purchasers; but though the motion was refused, the Court, in order to mark their disapprobation of the negligence and delay of the plaintiff's attorney, discharged the rule without costs (*n*). And if the attorney neglect to enter and docket the judgment in due time, by which a loss arises to his client, it seems he would be liable to an action (*o*). The opposite party may, also, in most cases, by summons before a Judge and his order thereon, compel the attorney for the prevailing party to enter the judgment on the roll, and docket it.

When either party dies (*p*) after verdict in vacation, judgment may be entered at common law in that vacation as of the preceding term (*q*), and in such case the roll ought to be brought in and filed before the first day of the subsequent term (*r*). If, however, the judgment be signed in vacation, by virtue of the statute of 1 W. 4, c. 7, *ante*, 316; in such case, it should not, it should seem, be entered as of the preceding term. (*See* 1 W. 4, c. 7, s. 3). By the 17 C. 2, c. 8, s. 1, the death of either party between verdict and judgment shall not be alleged for error, so as such judgment be entered

(*m*) Since the 1 W. 4, c. 70, s. 6, *ante*, 56, 57, it should seem, if the rolls be brought in before the first day of the term, it would now, in all cases, suffice.

(*n*) *Barrow v. Croft*, 4 B. & C. 388, 6 D. & R. 386, S. C.; and see 6 Mod. 59.

(*o*) See *Flower v. Earl of Bolingbroke*,

1 Str. 639; *Douglas v. Yallop*, 2 Bur. 722.

(*p*) *Mohun's case*, 6 Mod.

(*q*) *Bragner v. Langmead*, 7 T. R. 20; and see *Calvert v. Tomlin*, 2 M. & P. 1, 5 Bingh. 1, S. C.; *Price v. Hughes*, 1 Dowl. P. C. 448.

(*r*) *Price v. Hughes*, 1 Dowl. P. C. 448; *ante*, 57.

within two terms after such verdict. See the case of the death of a party more fully noticed, *post*, Vol. 2, 603, 878.

By the 4 & 5 W. & M. c. 20, s. 3, (made perpetual by 7 & 8 W. 3, c. 36, s. 3), a judgment which is not docketed shall not affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of the ancestor's, testator's, or intestate's estate(s). Also, by 4 & 5 W. & M. c. 20, s. 2, the clerk of the dockets shall docket all judgments entered of Easter and Trinity terms before the last day of Michaelmas term, and those entered of Michaelmas and Hilary terms before the last day of the ensuing terms, respectively, under the penalty of 100*l*. And these dockets shall be entered and kept in books of parchment, and may be searched and viewed by all persons at reasonable times, paying for every term's search 4*d*. and no more. Docketing of the *issue* is not a sufficient docketing of a judgment within the provisions of this act (*t*). It seems that if the judgment be signed and docketed immediately afterwards, then, although the judgment be not carried in, it will bind the defendant's lands or assets in the hands of the defendant's executor or administrator (*u*).

The Court will, in general, permit a judgment to be entered *nunc pro tunc*, where it is delayed by the act of the Court; but not where it is delayed by a proceeding in the common course of law, as by a writ of error, or the like (*v*).

*The practice as to entering and docketing the judgment is thus:—*If you have been ruled to enter the issue, and have already carried in and docketed your roll, as directed *ante*, 223, 224, *then all you have to do is to take the nisi prius record, (or the writ for the trial before the sheriff, &c., if there was one), with the master's allocatur, to the clerk of the treasury, who will continue the proceedings and enter the judgment on the roll; pay him 2s.* You must also docket the entry of the judgment, in order to bind the defendant's lands or assets in the hands of his executor or administrator (*w*); for which purpose *make out a docket paper of the judgment, and take it to the clerk of the judgments, who will enter the docket; pay him 3s.* (*x*).

But if the trial was had at *Nisi Prius*, and merely an *incipitur* have been entered on the issue roll at the time of passing the record of *nisi prius*, or if the trial was had before the sheriff, &c., and you have not carried in and docketed the issue, *you must enter the issue, &c. on the roll, as directed ante*, 222, *and then in a new paragraph continue the proceedings to the judgment* (*x*). Having thus made up your roll, docket your entry and carry in another roll, as directed *ante*, 223. After the entry of the judgment, the roll is thenceforward called the "judgment roll."

(s) See *Hickey v. Hayler*, 1 Esp. 313, 6 T. R. 384, S. C.; *Steel v. Rorke*, 1 B. & P. 307; *Wait v. Garth*, Barnes, 261.

(t) *Braithwaite v. Watts*, 2 C. & J. 318.

(u) See *Barrow v. Croft*, 4 B. & C. 388, 6 D. & R. 386, S. C.

(v) *Bates v. Lockwood*, 1 T. R. 637.

See *Lawrence v. Hodgson*, 1 Y. & J. 368, and cases there cited; *Marr v. Quin*, 6 T. R. 1; *post*, Vol. 2, 603.

(w) See *Braithwaite v. Watts*, 2 C. & J. 318; *Hall v. Tapper*, 3 B. & Adol. 655.

(x) See form, Chit. Forms, 204.

*When and how to be registered.*] Also, in order to bind lands in Middlesex or Yorkshire, it is necessary to file a memorial of the judgment in the registry office of such counties respectively; before which, the lands shall not be affected or bound by the judgment. (5 A. c. 18, s. 4; 6 A. c. 35, s. 19; 7 A. c. 20, s. 18; 8 G. 2, c. 6, ss. 1, 18). For this purpose, engross a memorial of the judgment upon a 10s. stamped piece of parchment (y); and write at the bottom of it a certificate of judgment having been signed (y). Take this to the master, who upon seeing the postea (or the writ and sheriff's return, &c., if the trial was had before the sheriff), and allocatur, will sign the certificate; pay him 1s. Then write an affidavit of the master's having signed the certificate, upon the same parchment (for which purpose the parchment has also a 2s. 6d. stamp) and swear it before a Judge of the Court in which the judgment was obtained, or before a master in Chancery; pay 1s. And lastly, take the parchment thus containing the memorial, certificate, and affidavit, and file it with the registrar at the registry office in Bell-yard (if the lands be in Middlesex); pay him 5s.

*Amendments of judgments.*] As to the amendments of judgments, see Vol. 2, Book 4, Part 1, Chap. 28. Where the judgment roll was lost, the Court allowed it to be supplied by a new entry (a).

### SECT. 3.

#### *Writ of Error.*

1. *Writ of Error generally*, 324 to 335.
2. *Writ of Error from the Court of King's Bench to the Exchequer Chamber*, 335 to 357.
3. *Writ of Error to the House of Lords, after affirmance or reversal in the Exchequer Chamber*, 357 to 362.
4. *Writ of Error from inferior Courts to the Court of King's Bench*, 362 to 367.
5. *Writ of Error to the House of Lords, after judgment of inferior Court affirmed or reversed in Court of King's Bench*, 367.
6. *Writ of Error coram nobis*, 367 to 373.

#### 1. *Writ of Error generally.*

*What.*] A writ of error is an original writ issuing out of the Court of Chancery, in the nature, as well of a *certiorari* to remove a record from an inferior to a superior Court, (excepting in the case of error *coram nobis*), as of a commission to the Judges of such

(y) See the form, Chit. Forms, 205.

(z) *Douglass v. Yallop*, 2 Bur. 722; *Evans v. Thomas*, 1 Str. 833.

superior court, to examine the record, and to affirm or reverse the judgment according to law (b).

*In what cases it lies.*] A writ of error lies, where a person is aggrieved by an error in the foundation, proceeding, judgment, or execution of a suit (c), provided it be an error in substance, not aided at common law or by some of the statutes of jeofail: (as to the defects so aided, see Vol. 2, Book 4, Part 1, Chap. 28). It can be brought only on a judgment, or an award in nature of a judgment (d), given in a court of record, acting according to the course of common law (e): but when the Court acts in a summary manner, or in a new course different from the common law, a *certiorari*, and not a writ of error, lies (f). And if the Court, where the judgment is given, be not a Court of record, the judgment can be reviewed by a superior Court, only by virtue of a writ of false judgment (g). The judgment, however, upon which error is brought, must be final, and not merely interlocutory (h). Yet this, it should seem, must be understood with some qualification; for from the old cases it may be collected, that wherever by common law the plaintiff might have the effect of his action by a judgment by default, (as for instance in real actions), if a statute afterwards give damages in such an action, so as to make it a mixed action, the plaintiff may bring a writ of error on a judgment by default (i), or on demurrer (j). And error may be brought on a judgment of nonsuit (k).

*In what cases granted.*] A writ of error is grantable *ex debito justitiæ*, and not *ex mera gratia*, in all cases except treason and felony (l).

*When to be brought.*] No judgment in any real or personal action shall be reversed or avoided for any error or defect therein, unless the writ of error be brought and prosecuted with effect within twenty years after such judgment signed or entered of record; provided the party against whom the judgment is given be not an infant, feme covert, *non compos mentis*, or in prison or beyond sea; in which cases the writ of error must be brought within twenty years after such disability ceases. (10 & 11 H. 3, c. 14). On account of

(b) 2 Saund. 100, (n. 1); 2 Bac. Abr. 448.

(c) Co. Lit. 289. b.

(d) Id.; 2 Bac. Abr. Error, (A. 2); and see Style, 265.

(e) *Groenvelt v. Burwell*, 1 Salk. 263; 2 Bac. Abr. Error, (A. 1).

(f) Id.; 1 Ld. Raym. 213, 252, 454; Carth. 494; Comyns, (80).

(g) Finch, L. 484; and see, as to the writ of false judgment, 2 Sellon, 410, 411, 423—427; *Scott v. Bye*, 2 Bing. 344, 9 Moore, 649, S. C.; 10 Went. 2, 3, 271.

(h) *Samuel v. Judin*, 6 East, 333; 3 Salk. 145; but see 19 Ass. 8; Ro. Abr.

675.

(i) 17 E. 3, 21, 33; Ro. Abr. 749, 750, 751.

(j) Ro. Abr. 750, 751; and see March, 89; Noy, 66; and see Palm. 1, 2.

(k) Ro. Abr. 744, 742; *Newell v. Pudgion*, 1 Str. 235; *Bor v. Bennett*, 1 H. Bl. 432; *Kempland v. Macauley*, 4 T. R. 436. See *Mee v. Hopkins*, 2 D. & R. 208; *Evans v. Swete*, 2 Bing. 326, 9 Moore, 609, S. C.

(l) *Reg. v. Paty*, 2 Salk. 504; and see 1 Sid. 69; 3 Bulst. 71; 2 Leon. 194; 1 Ro. Rep. 175.

the exceptions in this statute as to infants, &c., the defendant can have advantage of it only by pleading it, even although the objection appear upon the record (*m*); and therefore the Court have refused to quash a writ of error,\* upon motion, although it appeared to have been brought twenty-nine years after the judgment was signed (*n*).

The writ, however, may be brought and bear teste, even before the judgment is signed (*o*); and this is the usual practice, in order to prevent execution. It may be returnable at any time in the term of which the judgment is given (*p*), but not before it (*q*); yet where the plaintiff purposely deferred signing judgment until the writ of error was spent, the Court ordered a new writ of error at the expense of the plaintiff's attorney (*r*); and had execution been sued out, the Court would have set it aside (*s*).

*By and against whom to be brought.*] A writ of error can be brought by him only who was party or privy to the record, or injured by the judgment, and who consequently will derive advantage from its reversal (*t*). It may therefore be brought either by the parties themselves, or by their heirs, executors, or administrators (*u*). If lands descend to a man *ex parte materna*, and he lose them by an erroneous judgment and die, his heir *ex parte materna*, not *ex parte paterna*, shall have the writ of error (*x*). So the younger son, when entitled to land by the custom of borough English, shall have the writ of error, and not the heir at common law; for this remedy descends with the land (*y*). So, if tenant in tail female lose his lands by an erroneous judgment, and die, the writ of error must be brought by the issue female, and not by the son (*z*). If tenant in tail lose his estate by an erroneous judgment, and die without issue, the immediate remainder man or reversioner may bring error (*a*); and if the remainder man or reversioner were in any manner made a party to the record, he may bring the writ of error even during the life of the tenant in tail (*b*). In cases, however, where he was not a party to the record, and cannot therefore bring the writ of error until after the death of the tenant in tail without issue, yet the writ of error, it seems, must be brought (if at all) within 20 years from the time of the judgment, and not merely from the time of the accruing of the remainder man's

(*m*) *Street v. Hopkinson*, Hardw. 345; *Higgs v. Evans*, 2 Str. 1053.

(*n*) *Higgs v. Evans*, 2 Str. 837.

(*o*) *March*, 140; *Isaker v. Bulstrode*, 1 Vent. 255; *Perrin's case*, Moor, 461; *Jaques v. Nison*, 1 T. R. 280; *Somerville v. White*, 5 East, 145; *Emanuel v. Martin*, 2 M. & S. 334.

(*p*) *Cluther v. Thin*, 2 Sid. 104; 1 Str. 632.

(*q*) *Prydyerd v. Thomas*, 1 Vent. 96; *Latch*, 133; and see *Bridder v. Thomas*, 1 Sid. 466; *Roy v. Turner*, id. 311.

(*r*) *Arden v. Lumley*, Barnes, 250.

(*s*) *Jaques v. Nison*, 1 T. R. 280. See *post*, p. 337.

(*t*) Ro. Abr. 747; Dy. 90; *Randal's case*, 2 Mod. 308.

(*u*) See Godb. 377; 1 Leon. 261; but see *Randal's case*, 2 Mod. 308.

(*x*) 1 Leon. 261; 2 Sid. 56; and see *Owen*, 68; Godb. 377.

(*y*) *Owen*, 68; 1 Leon. 261; 4 Id. 5; and see *Bridg*, 79; 1 Ro. Rep. 311.

(*z*) Ro. Abr. 747; 1 Leon. 261; Dy. 90.

(*a*) 3 Co. 36; and see *Sheerwhanks v. Lucas*, 1 Bur. 410; Ro. Abr. 755, 796; *Lord Norris v. Marquis of Winchester*, Cro. El. 2; and see *Sir R. Champenow v. Sir R. Godolphin*, Cro. Jac. 160, 161.

(*b*) 3 Co. 4; 811-4, 5; Bro. Error, 39.

or reversioner's title to possession (c). If lessee for life lose his lands by an erroneous judgment, the immediate remainder man or reversioner may bring a writ of error: at common law, it could not be brought until after the lessee's death; but by stat. 9 R. 2, c. 3, it may be brought during the continuance of the estate for life (d). If there be judgment against the principal, and also judgment against the bail, the principal cannot have error on the judgment against the bail (e), nor the bail on the judgment against the principal (f), nor can they join in a writ of error (g), because the judgments are several, and affect distinct persons (h).

A writ of error is usually brought by the party against whom the judgment is given; but a plaintiff may bring error to reverse his own judgment, if he be dissatisfied with it, in order that he may be enabled to bring a new action (i). Also, if an action be brought against a feme covert as a feme sole, and she plead to issue as a feme sole, if judgment be given against her, and she be taken in execution, she and her husband may bring a writ of error, for otherwise he might be prejudiced by the loss of her society (k); indeed, if she were to sue out the writ in her own name, without joining her husband, the Court, upon application, would quash it (l). So, if an action be brought against a feme covert and others, they may all join with the husband in a writ of error (m).

Where a judgment is given against several, any of them may bring a writ of error; but it must be in the names of all, otherwise the Court will quash it (n); for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from having the benefit of his judgment, though it should be affirmed once or oftener. And so strict are the Courts in this respect, that although one of the parties may have died, yet he must be named in the writ, and his death stated, though the writ may be brought by the survivors alone (o). The

(c) *Lloyd v. Faughan*, 2 Str. 1257.

(d) 3 Co. 4 a; *Anon.* 5 Mod. 397; 2 Saund. 46 a.

(e) Ro. Abr. 749; 2 Leon. 4; *Bushell v. Yaller*, Cro. Car. 408; *South ats. Griffith*, Id. 481.

(f) Ro. Abr. 749; *Style*, 39; *Bushell v. Yaller*, Cro. Car. 408; *Atherton v. Hole*, 1 Lev. 137.

(g) *Lancaster v. Keydrigh*, Cro. Car. 300, 408; *Anon.* Id. 561; *Healings v. Mayor &c. of London*, Id. 574; *Sir J. Sandelov v. Deverton*, Cro. Jac. 384; *Forest v. Sir J. Sandland*, 110b. 72; 1 Ro. Rep. 294; *Atherton v. Hole*, 1 Lev. 137; *Lit.* 93.

(h) See *South ats. Griffith*, Cro. Car. 481; *Style*, 174; *Burr v. Atwood*, Carth. 447.

(i) *Johnson v. Jebb*, 3 Bur. 1772.

(k) Ro. Abr. 749, 759; 2 Ro. Rep. 53; *Style*, 254, 290.

(l) *M. Namara v. Fisher*, 8 T. R. 362.

(m) Ro. Abr. 747.

(n) MS. E. 1814; *Laroche v. Wau-brough*, 2 T. R. 738; *Knox v. Costello*, 3 Bur. 1739; *Brewer v. Turner*, 1 Str. 233; *Cooper v. Ginger*, Id. 606; *Vavasor v. Fautz*, 1 Wils. 88; *Gerrard v. Arnold*, 1 Ld. Raym. 405; *Hurr v. Atwood*, Id. 328; *Walter v. Stokoe*, Id. 71; Ro. Abr. 747; *Dy.* 89; 3 Leon. 176; *Bishop of Gloucester and Savarre's case*, Cro. El. 65; *Style*, 406; *Hacket v. Herne*, Carth. 7, 3 Mod. 134; *Spenser v. Rutland*, Yelv. 209; *Ross v. Etherington*, 2 Ld. Raym. 870; *Ginger v. Cooper*, Id. 1403, 1 Str. 606, S. C.; *Ratcliff v. Burton*, Hardw. 135; *Palm.* 151.

(o) *Brewer v. Turner*, 1 Str. 233.

death in such a case may be alleged in the writ thus: "*Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our Court before you and your companions, our Justices of the bench, by our writ, between J. N. [for whom the judgment was given] and J. S., late of* , *and G. II. [those against whom it was given] which said G. II. is since deceased, &c. to the great damage of the said J. S., who hath survived the said G. H., &c.*" (p). If, after error brought by one of several plaintiffs or defendants, in the names of all, the others refuse to come in and join with him in the assignment of errors, they must be summoned and severed; after which he may proceed in the writ of error alone (q), and the Court will give him time to assign errors, until the others can be summoned and severed (r). But if, in trespass against three, there be judgment against two of them by default, and the third justifies, and it is found for him, the two against whom judgment was given can alone join in a writ of error; for the other cannot say that the judgment was to his prejudice (s); and the same if the two had been found guilty by verdict, and the other acquitted (t). The writ, however, in these cases should describe the record as it really is, including all the parties to it, alleging the error to be to the "great damage" of those who bring the writ of error (u). Also, where an action was brought against two, one of whom was outlawed, and judgment passed against the other, and the latter thereupon brought a writ of error in his own name; an objection being taken that the writ should have been brought in the names of both, the Court overruled it, saying that the writ, as to one of the defendants, was determined by the outlawry (x). And in all cases where a writ of error is brought by some of several defendants, notwithstanding it may be liable to be quashed on this account, it still has the effect of removing the record, and is a *supersedeas* of execution as to all the defendants (y).

Where all the parties should have joined, and have not, if the defendant in error proceed without quashing the writ, and the judgment be affirmed, he can sue out execution against those only who were parties to the writ (z).

And it must be observed that if a party or his attorney enter into any agreement not to bring a writ of error, he is afterwards precluded from bringing it, though there be manifest error in the record (a);

(p) 2 Saund. 101 e.

(q) *Lord Crumwell v. Andrews*, Yelv. 3. 4, Cro. El. 891, S. C.; *Lancaster v. Lowe*, Cro. Jac. 94; and see *Shepherd v. Orchard*, 6 Mod. 40; *Winne v. Lloyd*, 1 Lev. 146.

(r) *Frescobaldi v. Kinaston*, 2 Str. 783. See a form of the writ of summons, *Thes. Brev.* 301.

(s) *Cannon v. Abbott*, 1 Lev. 210; *Parker v. Laurence*, Hob. 70; but see

*Style*, 190.

(t) *Vereist v. Rafael*, Cowp. 425.

(u) *Lady Cass v. Title*, 2 Str. 682.

(v) *Oliver v. Humming*, 1 Ld. Raym. 691; and see *Palm*, 151.

(y) *Laroche v. Wusbrough*, 2 T. R. 737.

(z) *Id.*

(a) *Cumden v. Etie*, 1 H. Bl. 21; *Cates v. West* 2 T. R. 183.

or if he bring it, the Court on motion will order him to nonpros it (b). And the Court are so strict in this respect, that where the defendant's attorney agreed not to bring a writ of error in the *action*; they held that the defendant's executors were thereby precluded from bringing error on a judgment in a *scire facias* which was brought against them to revive the judgment upon the death of the defendant (c).

As to defendants in error, the general rule is, that the writ of error must be brought against him only who was party or privy to the first judgment, or his heirs, executors, or administrators (d); and as to the number of defendants, the rule is the same as that relating to plaintiffs. However, where one only of two defendants in error appeared, and sued out a *sci. fa. quare executionem non*, and the plaintiff thereupon assigned errors; this was deemed a waiver of the objection that the other defendant should have joined (e).

You may sue out and prosecute a writ of error by a different attorney from that employed by you in the original action, without obtaining a Judge's order to change your attorney (f).

*In what Court to be brought.*] The writ of error is brought, either in the same Court in which the judgment was given, or to which the record has before been removed by a former writ of error, or in another and a superior Court.

If, upon a judgment in the Court of King's Bench, there be error in the process, or through the default of the clerks, it shall be reversed by writ of error returnable in the same Court (g). This writ is called "*error coram nobis*," because the record and process upon which it is founded are stated in the writ to remain "*before us*," that is, in the Court of King's Bench; the writ (as is the case with all original writs) running in the King's name.

Also, where the error is in fact and not in law, a writ of error *coram nobis* lies in the same Court; as where the defendant, being under age, appeared by attorney (h); but a defendant in ejectment cannot assign this for error (i). So, where the plaintiff or defendant was a married woman at the commencement of the suit (k), or died before verdict or interlocutory judgment (l), or the like.

Also, if a record be removed into this Court by writ of error, and the writ of error be quashed for insufficiency (m), or for any fault but variance between it and the record (n), a writ of error *coram nobis* may then be sued out here upon the record so removed; and if this latter writ be also quashed for insufficiency, you may have a second

(b) *Executors of Wright, Bart. v. Nutt*, 1 T. R. 388.

(c) *Id.* See *post*.

(d) 9 H. 6, 46; Bro. Error, 9; Ro. Abr. 749; and see 1 Ro. Rep. 302.

(e) *Knor v. Costello*, 3 Bur. 1789.

(f) *Batchelor v. Ellis*, 7 T. R. 337. See further, upon the subject of parties to a writ of error, Bac. Abr. Error, (B); 2 Saund. 101 *e. f.*

(g) F. N. B. 21; Poph. 181; Ro. Abr. 740; *Hopkins v. Welglenworth*, 2 Lev.

38; *Prior v. —*, Vent. 207; *Coxe v. Cropwell*, Cro. Jac. 5.

(h) Style, 406; *Danver's Abr.* Vol. 2, Error, pl. 13; and see 21 J. 1, c. 13, s. 2 See *Bird v. Pegg*, 5 B. & Ald. 418.

(i) *Goodright v. Wright*, 1 Str. 31.

(k) See Ro. Abr. 747, 748, 752; Style 254, 280; 2 Ro. Rep. 53.

(l) 2 Saund. 101.

(m) *Walker v. Stokoe*, Carth. 368, 369.

(n) *Cooper v. Ginger*, 1 Str. 607, 2 Ld. Raym. 1408, S. C.



writ of error *coram nobis* (o). So, if a writ of error in this Court, after the removal of the record, abate, either by the judgment of the Court, or by plea, death, or otherwise, a writ of error *coram nobis* lies here (p). And it has been decided that if plaintiff in error die depending the writ, and this Court, notwithstanding, proceed to reverse the judgment, the defendant in error may bring error *coram nobis* here upon this judgment of reversal, and assign the death of the plaintiff to the former writ as error (q). But error *coram nobis*, it seems, does not lie in this Court, upon a judgment of affirmance given here (r), nor after affirmance in the Exchequer Chamber (s); nor does it lie in the Exchequer Chamber, after a writ of error from this Court has abated there, by death or otherwise; a transcript only, and not the record itself, being always removed there; consequently there must be a new writ of error (t). Also, it may be observed that no writ of error, for error in fact, can be brought either in the Exchequer Chamber or House of Lords (u).

But if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same Court (v), but must be brought in another and superior Court.

From the King's Bench a writ of error at common law lay in all cases immediately to the House of Lords, whether upon judgments in causes originally commenced in the King's Bench, or brought there by writ of error (w). But now a writ of error upon any judgment (not being the reversal or affirmance of the judgment of an inferior Court (x), and not being a case in which the King is a party), given by this Court, must be made returnable before the Judges of the Common Pleas, and the Barons of the Exchequer in the Exchequer Chamber; and from the judgment thereupon given in the Exchequer Chamber there is no writ of error, except to the House of Lords. (1 W. 4, c. 70, s. 8). A writ of error, therefore, still lies to the House of Lords, first, after a reversal or affirmance of a judgment of this Court in the Exchequer; secondly, without a previous writ of error to the Exchequer, upon the reversal or affirmance by the King's Bench of the judgment of an inferior Court; and thirdly, where the King is a party. *Qui tam* actions do not fall within the exception as to the King (y).

To the King's Bench, either for error in fact (z), or error in law, a writ of error lies from all inferior Courts of record in England (with the exception of those in London and in some other places, which shall be noticed presently) (a); and after judgment of affirmance or

(o) *Walker v. Stokoe*, Carth. 369, 370; 1 Ld. Raym. 664.

(p) 2 Saund. 101 a.

(q) Ro. Abr. 747; Cro. El. 105; 4 Leon. 68.

(r) *Burleigh v. Harris*, 2 Str. 975; but see *Winchurch v. Belwood*, 1 Salk. 337.

(s) *Lambell v. Pretty John*, 2 Str. 690.

(t) 2 Saund. 101 a.

(u) *Id.*; *Castletine v. Mundy*, 4 B. & Adol. 27; *Roe v. Moore*, Com. Rep. 597. *Hopkins v. Weigdenworth*, 2 Lev. 38; *Prior v. —*, 1 Vent. 207, 208; *Roe v. Long*, Cro. Jac. 5; *Knoll's case*, 2 Salk.

145; but see *Price's case*, Cro. El. 731; *Wilkes v. Jordan*, Hob. 5; *Sir J. Fitzherbert v. Sir E. Leach*, Cro. Car. 514; *W. Jones*, 410, 411.

(v) 7 H. 6, 30; Ro. Abr. 749.

(w) 37 H. 6, 13; 11 E. 4, 9; Ro. Abr. 745.

(x) *Ricketts v. Lewis*, 2 C. & J. 11.

(y) *Lloyd v. Skutt*, 1 Doug. 333, and n. 91; *T. Raym. 275*; *Whitton v. Preston*, 1 Sid. 240.

(z) *Binn v. Pratt*, 1 Chit. Rep. 369.

(a) 4 Inst. 21, 22; *Finch*, (L), 480; Dy. 250.

reversal here, a writ of error lies to the House of Lords. A writ of error lies in the King's Bench upon a judgment in the County Palatine (b).

From the Common Pleas a writ of error lies to the Exchequer Chamber, before the Judges of the King's Bench and the Barons of the Exchequer, and afterwards to the House of Lords; from the law side of the Exchequer to the Exchequer Chamber, before the Judges of the King's Bench and the Common Pleas, and afterwards to the House of Lords. (1 W. 4, c. 70, s. 8). Also, from the law side of the Exchequer, in cases where the King is a party, to the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, calling to their assistance the Judges of the Courts of King's Bench and Common Pleas, or some of them, (31 Ed. 3, c. 12), and from thence to the House of Lords; from the Exchequer in Scotland to the House of Lords, (6 A. c. 26, s. 12); and from the King's Bench and Court of Exchequer Chamber in Ireland, also to the House of Lords. (39 & 40 G. 3, c. 67). But, for error in fact, a writ of error will not lie from the Common Pleas to the Exchequer Chamber, but only in the Court of Common Pleas or to the King's Bench (d).

Upon a judgment given in the Cinque Ports, no writ of error lies to the Court of King's Bench; but by custom such judgment is examinable by bill, in nature of a writ of error, before the Lord Keeper or Warden of the Cinque Ports, in his court of Shepway (e). So, upon a judgment given in the Court of Stannaries of the Duchy of Cornwall, no writ of error lies to the King's Bench; but the error is examinable upon appeal to the Warden of the Stannaries, and from him to the Prince, or, if there be no Prince, to the King's Council (f); provided the judgment have been for a matter touching the Stannaries (g).

Upon a judgment in the Sheriff's Court, or at the law side of the Mayor's Court in the city of London, a writ of error lies to the Court of Hustings, and from thence to commissioners appointed for that purpose by commission under the Great Seal (usually five of the Judges), and from them to the House of Lords (h).

*In what cases amendable.*] A writ of error was not amendable at common law (i). But now, by 5 G. 1, c. 13, all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective Courts where such writs of error shall be made returnable. Therefore, where a writ of error was brought jointly with one who should not have been joined, the Court allowed the writ to be amended by striking out his name (j). So, a mistake in the name of one

(b) 4 Inst. 214, 223; Ro. Abr. 745; but see, as to Durham, 4 Inst. 218.

(c) 2 Bac. Abr. 213; 4 Inst. 105.

(d) See *Castledine v. Mundy*, 4 B. & Adol. 90, 97; *Roe v. Moore*, Com. 537.

(e) 4 Inst. 224.

(f) Ro. Abr. 745.

(g) 3 Bulst. 181. See *Owen*, 8; *Aike v. Hunkin*, 1 Sid. 233.

(h) 6 Bro. Parl. Ca. 181; *Ballard v. Bennett*, 2 Bur. 777; *Cole v. Greene*, 1 Lev. 309; 2 Saund. 253, 101 b.

(i) *Thompson v. Crocker*, 1 Salk. 49; *Walter v. Stokoe*, 1 Ld. Raym. 564, 71.

(j) *Sword Blade Company v. Dempsey*, 2 Str. 892; *Fitzg.* 201; 1 Barnard. 405, 421; *Verelst v. Rafael*, Cowp. 425, 2 W. Bl. 1067, S. C.

of the parties has been amended (*k*); in another case the writ was amended by adding parties (*l*); and in another by altering even the description of the form of action (*m*). But when the writ is returnable before judgment is given, this is a fault which cannot be amended (*n*).

The amendment in this case is now allowed, as a matter of course, without costs (*o*); but if the rule be also to amend the assignment of errors, it is upon payment of costs (*p*). According to the statute, the writ is to be amended by the Court in which it is returnable; yet this seems to be only in cases where the original record, and not a transcript merely, is removed into such Court; and, therefore, upon a writ of error from the King's Bench to the Exchequer Chamber, it was holden that the writ should be amended in the Court of King's Bench, where the original record lay (*q*). Upon amending a writ of error, new bail must be put in to the amended writ, in the Court below (*r*).

*In what cases quashed.*] After the transcript has been returned and filed (*s*), the defendant in error may move the Court, in which the writ of error was returnable (*t*), to quash it, for some fault not amendable within the stat. 5 G. 1, c. 13, above mentioned; as, for having been returnable before the judgment was given (*u*); but where the defendant had ruled the plaintiff in error to assign, and the latter had assigned, and the defendant joined in error, which had been argued, and the judgment of the Common Pleas reversed, the King's Bench refused at that stage to quash the writ of error, on account of its having been returnable in the term before that of which the judgment of the Common Pleas was signed (*v*). The writ also may be quashed as to one judgment, and stand good for another; as where upon a judgment in *scire facias* against bail, the defendants brought a writ of error *tam in reditione judicii quam in adjudicatione executionis*, the Court quashed the writ, as far as it related to the original judgment (the bail having no right to bring error upon the judgment against their principal), and ruled it to stand good *quoad* the judgment against the bail on the *scire facias* (*w*). So, if a writ of error be sued out against good faith, for instance, if a defendant obtain time to plead, upon the condition of giving judgment of the term, as this

(*k*) *Barnard v. Guy*, 2 Smith, 259.

(*l*) *Lady Cass v. Title*, 2 Str. 682. See *Baker and Another, Assignees, &c. v. Newer*, 1 C. & M. 112, 1 Dowl. P. C. 618, S. C.; but see *Cooper v. Ginger*, 1 Str. 606, 2 Ld. Raym. 1403, S. C.; *Walter v. Stokoe*, 1 Id. 71; *Hackett v. Herne*, Carth. 8; *Re v. Inhabitants of All Saints, Derby*, 2 Str. 1110; *McNamara v. Fisher*, 8 T. R. 302.

(*m*) *Sampayo v. De Paya*, 5 Taunt. 32.

(*n*) *Wright v. Canning*, 2 Str. 807, 2 Ld. Raym. 1531, S. C.; 1 Barnard. 62, 63; *Rejindoz v. Randolph*, 2 Str. 834; *Fice v. Burton*, 1d. 891, *Wilson v. In-*

*goldshy*, 2 Ld. Raym. 1179; and see ante, 326; *sed vide infra*.

(*o*) *Gardner v. Merrett*, 2 Str. 902, 2 Ld. Raym. 1587, S. C.; Fitzg. 208.

(*p*) Fitzg. 268.

(*q*) *Rutter v. Redstone*, 2 Str. 837; *Tully v. Sparkes*, Id. 863.

(*r*) *Rafael v. Verelat*, 2 W. Bl. 1067.

(*s*) *A Court v. Swift*, 1 Ld. Raym. 329.

(*t*) *Lloyd v. Skutt*, 1 Doug. 350 to 353.

(*u*) *Stevens v. Ingram*, 3 Taunt. 304.

(*v*) *Nowell v. Roake*, 5 B. & C. 735, 1 M. & R. 175, S. C.

(*w*) *Burr v. Attwood*, Carth. 447, 1 Ld. Raym. 323, S. C.; and see *South v. Griffith*, Cro. Car. 481.

must be deemed an undertaking to give an available judgment, if the defendant bring error, the Court upon application will quash the writ (*x*). Notwithstanding the defect in the writ of error, for which it is quashed, still the record, if therein properly described, is removed by it, and remains in the superior Court, after the writ is quashed (*y*).

Costs are payable by the plaintiff in error, in all cases, upon quashing a writ of error (*z*), even where none were recoverable in the original action (*a*); it being enacted by stat. 4 A. c. 16, s. 25, that, upon quashing a writ of error for variance from the original record, or other defect, the defendant in error shall recover against the plaintiff issuing out such writ, his costs, as he should have had if the judgment had been affirmed. And this includes the costs of quashing the writ of error (*b*). But if the writ were rendered defective by the defendant's own acts, as by entering continuances on the judgment, or by delaying to sign it until the writ of error was spent, the defendant in error will not be allowed his costs (*c*); but, on the contrary, the Court will oblige him to pay the costs of the plaintiff (*d*).

*In what cases it abates.*] A writ of error abates where the plaintiff in error (*e*) dies before error assigned; in which case the defendant in error must sue out a *scire facias quare executionem non* against the executors to revive the judgment before he can sue out execution (*f*). But if he die after errors assigned, the writ does not abate, but the defendant must join in error, and proceed to have the judgment affirmed, if not erroneous, and, if there had been only one plaintiff in error, should afterwards revive the judgment by *scire facias* against his executors (*g*). Where, however, there are several plaintiffs in error, the writ does not abate by the death of one (*h*).

But the death of the defendant in error does not abate the writ; and much less the death of one of several defendants (*i*). If a sole defendant, or all the defendants die, the executors or administrators may be made parties by the *scire facias ad audiendum errores*, and

(*x*) *Cave v. Massey*, 4 D. & R. 624, 3 B. & C. 735, S. C.; *Cates v. West*, 2 T. R. 183.

(*y*) MS. E. 1814; *Laroche v. Wabrough*, 2 T. R. 737; *Ginger v. Couper*, 2 Ld. Raym. 1403, 1 Str. 606, S. C.; *Ratcliff v. Burton*, Hardw. 135, 2 Saund. 100, n.; *Priddy v. Thomas*, 1 Vent. 97; and see 2 Bac. Abr. Error, (D. 1). See *Sampayo v. De Payba*, 5 Taunt. 82; *Crawwell v. Thompson*, 4 D. & R. 153; *Lloyd v. Skutt*, Doug. 353.

(*z*) *Ginger v. Couper*, 2 Ld. Raym. 1403, 1 Str. 606, S. C.; *McNamara v. Fisher*, 8 T. R. 302.

(*a*) *Archbishop of Dublin v. Dean of Dublin*, 1 Str. 262.

(*b*) *Ginger v. Couper*, 2 Ld. Raym. 1403, 1 Str. 606, S. C.

(*c*) *Gould v. Cornethurst*, 1 Str. 139.

(*d*) *Rejindoz v. Randolph*, 2 Str. 834.

(*e*) 7 East, 207; *Spencer v. Rutland*, Yelv. 208; *Anon.* 1 Vent. 34.

(*f*) 2 Saund. 101, n.; and see *Spencer v. Rutland*, Yelv. 208; *Howard v. Pitt*, Carth. 236; *Penoyer v. Bruce*, Id. 404; *Id. Kinnaird v. Lyall*, 7 East, 206.

(*g*) 2 Saund. 101 n, o; and see *Id. Kinnaird v. Lyall*, 7 East, 206.

(*h*) *Clarke v. Rippon*, 1 B. & Ald. 586; but see *Penoyer v. Bruce*, 1 Ld. Raym. 244, 1 Salk. 319, S. C.; *Parker v. Harris*, Id. 261.

(*i*) 1 Salk. 319, 1 Ld. Raym. 244; *Ludlow v. Lennard*, 2 Id. 1205; *Anon.* 1 Vent. 34; *Wicket v. Creamer*, 1 Salk. 264, 1 Ld. Raym. 439, 1 Show. 180, S. C.; see *Bates v. Lockwood*, 1 T. R. 637.

be thereby compelled to join in error (*k*); or if one of several defendants die, upon suggesting the death upon the roll, you may proceed against the survivor (*l*). As to compelling the plaintiff, in such a case, to assign errors, if the defendant died before errors assigned, the survivors or executors, &c. may compel the assignment by *scire facias quare executionem non* (*m*); but if the defendant died after errors assigned, the survivors or the executors, &c. may proceed till judgment is affirmed, as if the defendant were living; and then, in case of the death of a sole defendant, his executors must revive the judgment by *scire facias* (*n*).

By the death of the Chief Justice before he has made and signed his return, the writ of error becomes ineffectual (*o*), and the defendant, with the leave of the Court, may sue out execution (*p*). But if the return have been signed by the Chief Justice, it may be certified after his death (*q*).

The writ may also abate by the act of the party; as where a feme sole, plaintiff in error, married pending the writ, the writ thereby abated, and the Court gave the defendant leave to sue out execution, although the plaintiff and her husband had brought a second writ of error (*r*). Also, where a feme sole, defendant in error, married, and the plaintiff pleaded this matter in abatement to the *scire facias quare executionem non*, the Court allowed the defendant's writ of *sci. fa.* to be quashed without costs (*s*). But bankruptcy is no abatement of a writ of error; and the proceedings after it by the assignees shall be in the bankrupt's name (*t*).

A writ of error in Parliament is not abated by a prorogation (*u*), or dissolution (*x*); but the proceedings continue in the same state in which they were at the time of such prorogation or dissolution.

The effect of abatement of a writ of error is, that the plaintiffs or their representatives may sue out and prosecute a new writ (*y*); yet if it has abated by the act or default of the party, the second writ is no *supersedeas* (*z*), and the defendant may sue out execution even without the leave of the Court (*a*); but if it have abated by the act of God, or by act of law, the second writ will be a *supersedeas* (*b*);

(*k*) *Wicket v. Creamer*, 1 Salk. 264, 1 Ld. Raym. 439, 1 Show. 186, S. C. 2 Saund. 101 o.; *Wright v. Treeeweke*, Barnes, 432.

(*l*) See a form of the suggestion, Lill. Ent. 217.

(*m*) *Wicket v. Creamer*, 1 Salk. 264, 1 Ld. Raym. 439, S. C. 2 Saund. 101 o.

(*n*) *Wright v. Treeeweke*, Barnes, 432, 2 Saund. 101 o.

(*o*) *Clonenshaw v. Stalgarforth*, Barnes, 201, bis; *Hayes v. Thornton*, Id. 2 Saund. 101 o.

(*p*) Id.

(*q*) *Allen v. Shaw*, 1 Sid. 268.

(*r*) *Jenkins v. Bates*, 2 Str. 1015; *Bul-*

*ler v. Lustano*, Id. 890.

(*s*) *Pocklington v. Peck*, 1 Str. 638.

(*t*) *Kretchman v. Beyer*, 1 T. R. 463.

(*u*) T. Raym. 383; *Gofton v. Sedgewick*, 2 Lev. 93.

(*x*) Ord. Dom. Proc. 18 March, 1678.

(*y*) See *Hartop v. Holt*, 1 Salk. 263, 1 Ld. Raym. 97, 5 Mod. 228, S. C.;

Comb. 383, 19, 12 Mod. 105, S. C.

(*z*) *Sir F. Duncombe's case*, 1 Mod. 285; *Anon.* 1 Vent. 100, S. C.; *Hartop v. Holt*, 1 Salk. 263, 1 Ld. Raym. 97, S. C.

(*a*) *Birch v. Triste*, 8 East, 412.

(*b*) 1 Keb. 658, 686; *Anon.* 1 Vent. 353.

and the defendant in error, even if no second writ be brought, cannot sue out execution without the leave of the Court (*d*).

When a writ of error in the Exchequer Chamber abates or is discontinued, the transcript must be remitted, and a *remittitur* entered, before the defendant can sue out execution in this Court (*e*). And the same, it should seem, of a writ of error in Parliament.

*When discontinued.*] If the plaintiff in error make default after errors assigned, the writ of error will thereby be discontinued. Formerly, if he did not assign errors within the term next after the record was certified, it would have been a discontinuance (*f*); but it has since been determined otherwise (*g*). Upon a discontinuance, the defendant in error is entitled to costs. (3 *H.* 7, c. 10; 8 & 9 *W.* 3, c. 11; and see *post*, 356).

## 2. *Writ of Error from the Court of King's Bench to the Exchequer Chamber.*

The cases in which a writ of error lies from the King's Bench to the Exchequer Chamber have been already noticed, *ante*, 330.

*The writ.*] The writ runs in the king's name, and is directed to the Chief Justice of the Court of King's Bench; it being a general rule, that a writ of error must be directed to the person before whom the judgment was given (*h*), or his successor, and in whose custody the record then is (*i*). It is tested on the day on which it is sued out, and which need not be a seal day (*k*). It states the plaint below, and, in general, recites shortly the 1 *W.* 4, c. 70, s. 8, and commands the Chief Justice, that he send before the Judges of the Common Pleas and the Barons of the Exchequer, in the Exchequer Chamber, on a particular day, a transcript of the record, &c. It is not necessary that there should be fifteen days between the *teste* and return of it (*l*).

Care must be taken, in all cases, that the writ corresponds with the record intended to be removed, in the names and additions of the parties (*m*), in the description of the Court in which the judgment was given (*n*), and in the description of the action (*o*); for the Court can proceed only on that record, which the writ authorizes them to

(*d*) *Lord Kinnaird v. Lyall*, 7 East, 296.

(*e*) *Laroche v. Wabrough*, 2 T. R. 737; *Howard v. Pitt*, Carth. 236, 237, 1 Salk. 261, S. C.

(*f*) F. N. B. 20.

(*g*) 3 Salk. 145; Tidd, 1070.

(*h*) Godb. 44; 1 Salk. 264, 265.

(*i*) 4 Inst. 105.

(*k*) *Hill v. Tebb*, 1 New Rep. 298.

(*l*) *Laidler v. Foster*, 4 B. & C. 116. See the form, Chit. Forms, 206.

(*m*) See 2 Ro. Rep. 210; Palm. 152; *Dashwood v. Cooper*, 2 Mod. 285; *Walter v. Stokoe*, 1 Ld. Raym. 71, Carth. 368, S. C.; *Cooper v. Ginger*, 1 Str. 606;

*Wraight v. Kitchingman*, Id. 200; *Hunt v. Lawson*, 1 Ld. Raym. 347; *Sherley v. Underhill*, Hob. 327, Hut. 41; *Mason v. Fox*, Cro. Jac. 63, Style, 153; *Williams v. Jenkins*, 1 Sid. 104; *Booth v. Beards*, Id. 193; *Ingoldsby v. Martin*, 1 Str. 316; *Laroche v. Wabrough*, 2 T. R. 737; *Prydyerd v. Thomas*, 1 Vent. 97.

(*n*) See *Gibbons v. Saunders*, 2 Ld. Raym. 819; Style, 344; 2 Saund. 291; Ro. Abr. 752; Style, 191, 203; *Lord Cromwell v. Andrews*, Yelv. 3 b. Cro. El. 891, S. C.; Noy, 44; Godb. 248; 1 Ro. Rep. 15; Dy. 77.

(*o*) *Darby v. Aneley*, 2 Ld. Raym. 1170.

examine. As to the cases, in which the Court will amend the writ of error, when it varies from the record, *see ante*, 331, 332. If there be several records in the Court below between the same parties, with which the description in the writ of error agrees, the Court below may remove which of them they please (p).

Where the error is supposed to be as well in giving the judgment as in awarding execution upon it, as in *scire facias* to revive a judgment, the writ of error is said to be *tam quam*, or, in the words of the writ, *tam in reditione judicii, quam in adjudicatione executionis* (q).

*How sued out.*] Make out a *præcipe* for the writ, stating the names of the parties, the form of action, and whether the judgment were upon verdict, or inquiry, &c., and stating where and when the writ is to be made returnable (r). Take this to the *cursitor* of the county in which the venue was laid in the original action, who will make out the writ, and get it sealed at the next general seal, or (if expedition be requisite) at a private seal. If it be sealed at a general seal, pay him 1l. 10s. 6d.; if at a private seal, 8s. 6d. more.

*Allowance of it, and how far a supersedeas.*] Take the writ to the clerk of the errors of this Court, without delay, (R. E. 36 C. 2), and he will allow it, and give you a note of allowance; pay him 2l. (s). Make a copy of this note, and serve it upon the attorney of the opposite party, at the same time shewing him the original. This note of allowance may be served before the plaintiff is entitled to sign final judgment (t); and it is usual to serve it at the time of taxing the costs, in order to prevent the other party from suing out execution. For, although the allowance itself is a *supersedeas*, (*see R. H. 2 W. 4, r. 83*), and the service of the copy of the note of allowance only necessary in order to bring the opposite attorney into contempt, should he afterwards sue out execution (u), yet this service before execution actually sued out is advisable, and should not be omitted, as it will save the expense of a subsequent application to the Court, to set aside the execution. Moreover, the sheriff and his officers, if he execute a *fi. fa.*, &c., after this notice of allowance, would be liable in trespass, although there be no further *supersedeas* of the execution (v). The note of the allowance, must properly describe the form of action: if it misdescribe it, it is no stay whatever of plaintiff's

2 Salk. 660, S. C.; *Sampayo v. De Payba*, 5 Taunt. 82; 2 Ro. Rep. 22; *Rhodam v. Watson*, 2 Ld. Raym. 1220; *Collins v. Seavington*, 3 Salk. 398.

(p) *Prydyerd v. Thomas*, 1 Vent. 96, 1 Sid. 466, S. C.; *Rinch v. —*, T. Raym. 189.

(q) 2 Saund. 101 g; *Street v. Hopkinson*, 2 Str. 1056, Hardw. 345, S. C.

(r) See the form, Chit. Forms, 206.

(s) See the form of the note of allowance, Chit. Forms, 207.

(t) *Payne v. Whaley*, 2 B. & P. 137. See *Somerville v. White*, 5 East, 145; *Stevens v. Ingram*, 3 Taunt. 384.

(u) *Jaques v. Niron*, 1 T. R. 280, Ro. Abr. 492; *Capron v. Archer*, 1 Bur. 340; *Bickerton v. Lewis*, Barnes, 275; *Smith v. Cave*, 3 Lev. 312; *Morfoot v. Chivers*, 1 Str. 632; *Meriton v. Stevens*, Willes, 271; *Lane v. Bacchus*, 2 T. R. 44; *Gravill v. Stimpson*, 1 B. & P. 478; *Meagher v. Vanduyck*, 2 Id. 370; *Hawkins v. Jones*, 5 Taunt. 204. See *Thorpe v. Beer*, 2 B. & Ald. 373.

(v) *Belshaw v. Marshall*, 4 B. & Adol. 336; and see *Bleasdale v. Darby*, 9 Price, 606; *Meriton v. Stevens*, Willes, 271.

proceeding to execution (*x*). Where the defendant had wilfully concealed the issuing the writ of error from the plaintiff, the Court set aside an execution afterwards issued, without costs, and made the defendant undertake that no action should be brought (*y*).

In order to render a writ of error a *supersedeas of execution*, two things are requisite: the allowance, and putting in bail. If the writ of error be sued out, and allowed *before* final judgment, (or even before interlocutory judgment) (*z*), and the judgment be afterwards signed either before the writ of error is returnable, or in the same term, or if it be signed in the following vacation, as of the term in which the writ was returnable, the writ will be a *supersedeas of execution* (*a*); provided bail in error be put in and notice thereof given (*b*), within four clear days after the judgment is signed (*c*), the writ in this case having effect, and the allowance operating, only from the time of signing the judgment (*d*). But if the writ be returnable in a term previous to that of which the judgment is signed, it is no *supersedeas* (*e*); yet, where the party, in such a case, purposely refrained from signing his judgment until the writ of error was spent, the Court made his attorney sue out a new writ of error at his own expense (*f*), and, if execution had been also sued out, the Court would have set it aside (*g*).

If the writ of error be sued out *after* judgment, and before execution executed, it operates as a *supersedeas* from the time of the allowance (*h*); provided bail in error be put in, and notice thereof given (*i*), within four clear days after the allowance (*j*). Or if, after the writ is sued out, and before allowance, actual notice of it be given to the opposite party, and of its being delivered to the clerk of the errors, it operates as a *supersedeas* from the time of the notice (*k*). Even where a prisoner, after a *habeas corpus* lodged for the purpose of bringing him up to be charged in execution, sued out and obtained an allowance of a writ

(1) *Green v. Okill*, 1 Dowl. P.C. 422; *Hills v. Spilbury*, Id. 421.

(y) *Brathwaite v. Brown*, 1 Chit. Rep. 238.

(z) *Emanuel v. Martin*, 2 M. & S. 334.

(a) *Somerville v. White*, 5 East, 145; *Hill v. Tebb*, 1 New Rep. 298; Barnes, 189; *Curd v. Eastwood*, Id. 260; *Hamnot v. Farrettes*, Id. 376; *Williams v. Jenkins*, 1 Sid. 104; 2 Bac. Abr. Error, (C); R. H. 2 W. 4, r. 83.

(b) *Attenbury v. Smith*, MS. E. 1821, 2 D. & R. 85, S. C.

(c) *Lane v. Bacchus*, 2 T. R. 44; *Gravall v. Stimpson*, 1 B. & P. 478; *Jaques v. Nixon*, 1 T. R. 279; *Bennett v. Nicholls*, 4 T. R. 121; and see *Blackburn v. Kyrmer*, 5 Taunt. 672; *Smith v. Howard*, 2 D. & R. 85.

(d) *Jaques v. Nixon*, 1 T. R. 279.

(e) *Canning v. Wright*, 2 Ld. Raym.

1531, 2 Str. 807, S. C.; *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179; *Witty v. Polehampton*, 3 Salk. 398; *Hill v. Tebb*, 1 New Rep. 298.

(f) *Arden v. Lamley*, Barnes, 250.

(g) *Jaques v. Nixon*, 1 T. R. 279, 280.

(h) *Sampson v. Brown*, 2 East, 439; *Mougher v. Vandryck*, 2 B. & P. 370; *Meriton v. Stevens*, Willes, 271; *Hawkins v. Jones*, 5 Taunt. 204; R. M. 5 W. & M. a; R. H. 2 W. 4, r. 83.

(i) *Attenbury v. Smith*, MS. E. 1821, 2 D. & R. 85, S. C.

(j) *Lane v. Bacchus*, 2 T. R. 45; *Gravall v. Stimpson*, 1 B. & P. 478; and see *Jaques v. Nixon*, 1 T. R. 280.

(k) R. M. 5 W. & M. (a); *Meriton v. Stevens*, Willes, 271; *Perkins v. Woolaston*, 1 Salk. 321, 2 Ld. Raym. 1256, S. C.



of error: it was holden that he could not, after that, be charged in execution, but should be remanded to his former custody (l).

After allowance or notice, if the defendant in error (where bail is requisite) take out execution before the time for putting in bail have expired, he does it at his peril; for if bail be afterwards regularly put in, the execution will be set aside (m); and with costs, at all events, if a copy of the note of allowance were previously served.

A writ of error, after allowance, is so entirely a *supersedeas* of execution, that the plaintiff below cannot afterwards sue out a *ca. sa.* even for the purpose of proceeding against the bail (n). Or even if the *ca. sa.* had been sued out before the allowance of the writ of error, the plaintiff below cannot, after the allowance, proceed against the bail, although the writ have previously lain four days in the sheriff's office (o); nor can he call even for a return of the writ (p); or if the writ be returned after notice of the allowance, (though on the same day), and a *scire facias* be afterwards sued out against the bail, the Court will set aside the proceedings with costs (q); or the bail, in such a case, may plead to the *scire facias*, that after the issuing and before the return of the *ca. sa.* against the principal, a writ of error issued and was duly allowed, without stating it to have been returned (r); and if bail in error, when requisite, were not put in, the plaintiff must shew that in his replication (s). And where the writ of error is not sued out until after a *scire facias* brought against the bail, the Court, notwithstanding, will stay the proceedings upon the *scire facias* until the determination of the writ of error, upon the bail undertaking to render the defendant, or pay the sum recovered (if judgment should be affirmed) within four days after affirmance, and also agreeing not to file a bill in equity, (*R. T. 1 A. r. 1, a*) (t), provided the time granted by the indulgence of the Court to the bail to render their principal have not expired, at the time of the application. (*R. II. 2 W. 4, r. 84*) (u). But if the bail be fixed, and there be no bail in error, the Court, in such a case, will oblige the bail to the action to undertake to pay the condemnation money, and the costs of the writ of error, in the event of the judgment being affirmed (x). A writ of error by the bail, however, is no *supersedeas* of execution against the principal (y).

If an action be brought upon the judgment, pending a writ of error, it is entirely in the discretion of the Court to stay the pro-

(l) *Stonehouse v. Ramsden*, 1 B. & Ald. 676.

(m) *Lane v. Bacchus*, 2 T. R. 44.

(n) *Dudley v. Stokes*, 2 W. Bl. 1183; *Streetapple v. Goodfellow*, 2 Str. 867; and see *Stonehouse v. Ramsden*, 1 B. & Ald. 676.

(o) *Perry v. Campbell*, 3 T. R. 390.

(p) *Smith v. Nicholson*, 2 Str. 1186; 1 Wils. 10, S. C. See *Parkins v. Wilson*, 2 Ld. Raym. 1256.

(q) *Miller v. Newbald*, 1 East, 662.

(r) *Sampson v. Brown*, 2 East, 439.

(s) *Id.* 445.

(t) See Ro. Abr. 491; and see *Buchanan v. Alders*, 3 East, 546; *Sprang v. Montprivatt*, 11 East, 316.

(u) *Sprang v. Montprivatt*, T. 49 G. 3, MS. B. 1607-8.

(x) *Riston v. Francis*, 2 Str. 677; *Copous v. Blyton*, 1 New Rep. 67.

(y) Ro. Abr. 491.

ceedings or not. But, although an application for this purpose is not acceded to as a matter of course, the Court usually grant it, unless the conduct of the plaintiff in error appear to be vexatious, or intended merely for delay (z). The plaintiff in error cannot make this application, until after he have put in and perfected bail (a); and if the action be brought in this Court, on a judgment of the Common Pleas, the Court will oblige the defendant to give the plaintiff judgment in the second action (b). What has now been said, relates to proceedings in the action on the judgment; but it seems, in all cases, where the writ operates as a *supersedeas*, the Court will stay the issuing or executing of a writ of execution in such second action, until the writ of error be determined; for otherwise, it would be allowing the defendant in error to do that indirectly which he could not do directly (c). But where a writ of error on the first judgment was not brought until after the plaintiff had recovered in an action on the judgment, and had obtained judgment therein; the Court refused to set aside the execution of a writ of inquiry and a writ of execution, although sued out and executed after the allowance of the writ of error (d).

If a writ of execution have issued upon the judgment in the original action, and a writ of error be afterwards sued out and allowed, as long as the writ of execution is executable and not executed, the writ of error will operate as a *supersedeas* of execution (e). But after the sheriff has partly executed the writ, he must proceed in the execution, notwithstanding a writ of error; as where the sheriff had seized under a *fiery facias*, and then a writ of error was brought and allowed, the Court held that he should sell the goods, and pay the money into Court to abide the event of the writ of error (f).

Where it appears from the admission of the plaintiff in error (g), or his attorney (h), (the admission of the attorney's clerk being insufficient) (i), or from the admission of his bail (k), or from expressions equivalent to a confession (l), that the writ of error is brought for the pur-

(z) *Cristie v. Richardson*, 3 T. R. 78; 2 T. R. 78; and see *Gribble v. Abbott*, Cowp. 72; *Hanbury v. Guest*, 14 East, 401.

(a) *Bicknell v. Longstaffe*, 6 T. R. 455; *Smith v. Shepherd*, 5 T. R. 9; *Abraham v. Pugh*, 5 B. & Ald. 903.

(b) *Bates v. Lockwood*, 1 T. R. 638; and see *Wade v. Rogers*, 2 W. Bl. 780.

(c) *Benwell v. Black*, 3 T. R. 643; *Tanwell v. Stone*, 4 Bur. 2454. See *Robinson v. Tuckwell*, Willes, 183; 2 Bac. Abr. Error, (H).

(d) *Bishop v. Best*, 3 B. & Ald. 275.

(e) *Perkins v. Woolston*, 1 Salk. 321, 2 Ld. Raym. 1254, S. C.; *Milstead v. Coppard*, 5 T. R. 272; *Lord Kinnaird v. Lyall*, 7 East, 296; 2 Ro. Abr. 491.

(f) *Meriton v. Stevens*, Willes, 271,

280. See *Doe d. Messiter v. Dymelez*, 4 Taunt. 289.

(g) *Pool v. Charnock*, 3 T. R. 79; *Hawkins v. Snuggs*, 2 M. & S. 476. See *Gribble v. Abbott*, Cowp. 72.

(h) *Law v. Smith*, 4 T. R. 436, n.; *Spooner v. Garland*, 2 M. & S. 474; *Miller v. Cousins*, 2 B. & P. 329; *Mitchell v. Wheeler*, 2 H. Bl. 30; *Barber et al. v. Bolt*, T. 32 G. 3, MS. B. 1659.

(i) *Bygrove v. Bolland*, 2 Chit. Rep. 193.

(k) *Kemland v. Macnuley*, 4 T. R. 436, n.

(l) *Masterman v. Grant*, 5 T. R. 714; *Miller v. Cousins*, 2 B. & P. 329. See 2 Bligh. 326; *Mee v. Hopkins*, 2 D. & R. 208; and *Eicke v. Sowerby*, 1 B. & C. 287.

pose of delay (*m*); or where the writ is brought against good faith (*n*), or a positive agreement (*o*); or, if bail be not put in within the time limited for that purpose (*R. Ex. 36 Car. 2.*); or if the writ of error be returnable in a term previous to that of which the judgment is signed (*q*): in all these cases, the writ of error neither operates as a *supersedeas* of execution, nor will proceedings in an action on the judgment, or proceedings against bail (*r*), be stayed; and the Court, upon application, will allow the party who obtained the judgment below to proceed by suing out execution, &c.; and in some cases he may so proceed without such leave. But where the defendant, *before any action brought*, said that he should bring a writ of error, and delay the plaintiff, the Court did not conceive this to be sufficiently indicative that the writ of error, afterwards brought, was merely for the purpose of delay, and therefore refused to allow the plaintiff to sue out execution (*s*). Nor is it sufficient to prevent a writ of error being a *supersedeas* of execution, that the defendant's attorney declared the debt would be settled, and that time was all the defendant wanted (*t*); or that the plaintiff swear that the writ of error was brought for delay, and that he offered to the defendant's attorney to waive the judgment, if he would point out any error in it, who refused to do so (*u*). But where, *after action brought*, the defendant threatened to bring a writ of error and ruin the plaintiff by law proceedings, unless he complied with certain terms, the defendant suggesting no ground of error, the Court allowed the plaintiff to take out execution (*x*). Where the defendant obtained time to plead, upon condition of his giving judgment of the term, the Court held that as his undertaking was, in substance, to give an available judgment, he could not afterwards bring a writ of error (*y*). The Court have refused to allow execution to be sued out, merely because the defendant suffered judgment to be affirmed in the Exchequer Chamber without objection, and then brought error in Parliament (*z*).

A writ of error brought upon a judgment of *nonsuit*, does not, unless error be pointed out, operate as a *supersedeas*, on the ground that the writ could only be brought for delay (*a*).

If a writ of error *abate* by the act or default of the party, a second writ of error will not operate as a *supersedeas*, and the defendant in

(*m*) See *Levett v. Perry*, 5 T. R. 670.

(*n*) *Cates v. West*, 2 Id. 183.

(*o*) *Camden v. Edie*, 1 H. Bl. 21; *Executors of Wright v. Nutt*, 1 T. R. 388; and see *Cave v. Massey*, 5 D. & R. 624, 3 B. & C. 735, S. C.

(*q*) *Wright v. Canning*, 2 Str. 807, 2 Id. Raym. 1531, S. C.; *Wilson v. Ingoldsby*, Id. 1179; *Witty v. Polehampton*, 3 Salk. 98. See *Somerville v. White*, 5 East, 145; and *ante*, 337.

(*r*) *Pool v. Charnock*, 3 T. R. 79.

(*s*) *Baskett v. Burnard*, 4 M. & S. 331; *Rodford v. Garrod*, 7 Taunt. 537.

(*t*) *Ravens v. Perry*, 1 New Rep. 307.

(*u*) *Cristie v. Richardson*, 3 T. R. 78;

*Kemland v. Macauley*, 4 T. R. 437. See *Eicke v. Sowerby*, 1 B. & C. 287.

(*x*) *Berdoe v. Bloomfield*, 6 D. & R. 509.

(*y*) *Cave v. Massey*, 5 D. & R. 624, 3 B. & C. 735, S. C.

(*z*) *Harrison v. Grote*, 6 T. R. 400; but see *Entwistle v. Shepherd*, 2 T. R. 78.

(*a*) *Keeling v. Austin*, 1 Dowl. P. C. 228, 5 M. & P. 509, 7 Bing. 601, S. C.; *Box v. Bennett*, 1 H. Bl. 432; *Kemland v. Macauley*, 4 T. R. 436; *Mee v. Hopkins*, 2 D. & R. 208; *Evans v. Swete*, 2 Bing. 326; overruling *Levett v. Perry*, 5 T. R. 669.

error may sue out execution without the leave of the Court (b); but if it have abated by the act of God, or by act of law, the second writ will be a *supersedeas* from the allowance of it, as in ordinary cases. (*Ante*, p. 333).

It may be necessary perhaps to add, that although a writ of error be so defective, that the Court would quash it upon motion; as, for instance, if it be brought by some only of several defendants, yet, until quashed, it operates as a *supersedeas* as to all the defendants (c).

*Bail.*] As bail in error differs in many respects from bail to the action, it will be necessary to state the practice of the Court upon the subject with particularity. We shall therefore consider it under the following heads:—1. In what cases bail in error is requisite;—2. At what time it must be put in; and—3. How put in and justified.

1st. As to the cases in which bail in error is requisite:—No bail in error was required at common law, although the writ of error was not formerly allowed until error was shewn (d). The statute, however, of 3 Jac. 1, c. 8 (made perpetual by 3 Car. 1, c. 4, s. 4) enacts, that “no execution shall be stayed or delayed, upon or by any writ of error, or *supersedeas* thereupon to be sued, for the reversing of any judgment in any action or bill of debt, upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract sued in any of the Courts of Record at Westminster, or in the counties palatine of Lancaster or Durham; nor (by the 19 Geo. 3, c. 70, s. 5) for the reversing of any judgment given in any inferior Court of Record, where the damages were under 10*l.* (since extended to 20*l.* by the statute 7 & 8 Geo. 4, c. 71, s. 6) (e), unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, (such as the Court wherein the judgment was given shall allow of), shall first be bound unto the party for whom the judgment was given, by recognizance to be acknowledged in the same Court in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error nonprossed, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution (f).

This statute, 3 Jac. 1, c. 8, is extended to other actions by the 13 Car. 2, stat. 2, c. 2, s. 9; by which it is enacted, that “no execution shall be stayed in any of the Courts mentioned in the former statute, by any writ or writs of error, or *supersedeas* thereupon after

(b) *Birch v. Triste*, 8 East, 412.

(c) *Laroche v. Wadsworth*, 2 T. R. 737; *Lloyd v. Skutt*, Doug. 353; and see *ante*, 332.

(d) Tidd, 9th ed. 1149.

(e) See *Furnish v. Swan*, 10 B. & Cres. 458.

(f) As to what actions this statute is confined, and to what judgments it extends, and in what cases bail in error are required in debt on bond, and in actions on contracts, &c., according to this statute, see Tidd, 9th ed. 1150.

verdict and judgment, in any action of debt grounded upon the statute 2 & 3 *Edw. 6*, c. 13, s. 1, for not setting forth tithes; nor in any action upon the case upon any promise for payment of money, actions *sur trover*, actions of covenant, detinue, and trespass, unless such recognizance, and in such manner as by the former act is directed, shall be first acknowledged in the Court in which judgment was given." And by 16 & 17 *Car. 2*, c. 8, s. 3 (made perpetual by 22 & 23 *Car. 2*, c. 4) "no execution shall be stayed in any of the last-mentioned Courts, by writ of error or *superseatas* thereupon, after verdict and judgment in any action personal whatsoever, unless a recognizance, with condition according to statute 3 *Jac. 1*, shall be first acknowledged in the Court where such judgment shall be given. And further, that in writs of error to be brought upon any judgment after verdict, in any writ of *dower*, or in any action of *ejectione firmæ*, no execution shall be stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound to the plaintiff in such writ of *dower* or action of *ejectione firmæ*, in such reasonable sum as the Court in which such writ of error shall be directed, shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuited in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit." And to the end, that the same sum and sums, and damages, may be ascertained, it is further enacted, that "the Court wherein such execution ought to be granted, upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages, by any waste committed after the first judgment in *dower*, or in *ejectione firmæ*: and upon the return thereof, judgment shall be given, and execution awarded, for such mesne profits and damages, and also for costs of suit." (*Id.* s. 4) (g).

And now, by stat. 6 *G. 1*, c. 96, s. 1, for preventing the delays occasioned to creditors by frivolous writs of error brought on judgments given in his majesty's Courts of record at Westminster and in the counties palatine, it is enacted, "that upon any judgment hereafter to be given in any of the said Courts, in any personal action, execution shall not be stayed or delayed by writ of error or *superseatas* thereupon, without the special order of the court, or some Judge thereof, unless a recognizance with condition according to the statute made in the third year of the reign of his majesty King James the First, intituled 'An act to avoid unnecessary delays of execution,' (*vide supra*), be first acknowledged in the same Court."

Bail in error therefore is now necessary in all cases after judgment for the plaintiff in any personal action, whether after verdict or default, unless it be otherwise ordered by the Court or a Judge; and it should

(g) As to what judgments these statutes of Charles are confined to, see Tidd, 9th ed. 1153.

seem, that such order could not be made in any of those actions in which the statutes previous to the above act of 6 G. 4. require bail in error. And bail in error is requisite by that act, although there be real error in form on the face of the record, unless the Court or a Judge order it to be dispensed with (*h*).

But the statutes requiring bail in error are confined to cases where judgment has been given for the original plaintiff, and do not apply to judgments given for the defendant below; and a party therefore who is both plaintiff below and above need not give bail in error (*i*). The statutes prior to the 6 G. 4. c. 96, do not extend to the writ of error *coram nobis* (*j*) or *vobis*; which was or was not a *supersedeas* of execution, according to circumstances. (*Post*, 347). But, by that act, it should seem that bail would be requisite on such writ. (*Id*).

Where the Court affirm a judgment, and another writ of error is brought upon the judgment of affirmance, bail must be again put in upon the second writ (*k*). Also, where a writ is amended, fresh bail must be put in to the amended writ (*l*). The bail upon a new writ must be put in in the Court where the record is supposed to remain; upon an amended writ, it is put in in the Court in which the writ of error has been allowed.

2dly. As to the time at which bail must be put in:—If the writ of error be allowed *before* the judgment is signed, the plaintiff in error has four clear days, after the signing of the judgment, to put in bail; as, if judgment be signed on Monday, he shall have all Friday to put in bail; and in default of his doing so, the defendant cannot sue out execution until the Saturday (*m*). But if the writ be sued out *after* judgment, the plaintiff in error has four clear days to put in bail, from the time of the allowance of the writ of error (*n*). If the plaintiff in error do not put in bail within the time here specified, the defendant may immediately sue out execution (*o*), and it is not necessary to obtain previously a certificate from the clerk of the errors that no bail has been put in (*p*). The only effect, therefore, of not putting in bail, will be, that the defendant will sue out execution; but the writ of error may still be prosecuted in the same manner as if no bail were required. Under circumstances, the Court or a Judge will allow further time to put in the bail. (*See ante*, 152).

3rdly. As to the mode of putting in and justifying bail:—*Make a note or memorandum of the bail upon a piece of paper* (*q*); *intitle it in the original cause, and take it to the clerk of the errors of this Court,*

(*h*) See *Wudsworth v. Gibson*, 1 M. & P. 501, 4 Bingh. 572, S. C. See form of summonses for Judge's order to dispense with bail, Chit. Forms, 209.

(*i*) *Duvergie v. Fellowes*, 1 Dowl. P. C. 224, 5 M. & P. 403, 7 Bing. 463, S. C.; *Treeman v. Garden*, 1 D. & R. 184; 4 Mod. 7; 5 East, 545.

(*j*) 2 Crom. 3rd ed. 377.

(*k*) *Tilly v. Richardson*, 1 Salk. 97, 2 Ld. Raym. 840, S. C.; *Colebrook v. Digges*, 1 Str. 527.

(*l*) *Rafael v. Vereist*, 2 W. Bl. 1067.

(*m*) *Lane v. Bacchus*, 2 T. R. 44;

*Jacques v. Nixon*, 1 T. R. 279; *Bennett v. Nicholls*, 4 T. R. 121; *Gravall v. Stimpson*, 1 B. & P. 478; and see *Blackburn v. Kymer*, 5 Taunt. 672, 1 Marsh. 278, S. C.

(*n*) *Lane v. Bacchus*, 2 T. R. 45; *Gravall v. Stimpson*, 1 B. & P. 478; R. E. 36 C. 2; and see 1 T. R. 279.

(*o*) — *v. Nicholls*, 2 Chit. Rep. 106.

(*p*) *Inclusion v. Clarke*, Barnes, 212.

(*q*) See the form, Chit. Forms, 207; and see, as to the form of the bail piece in other cases, *ante*, 153.

who will enter the same in his book. Appoint with him to meet you at the chambers or house of a Judge of this Court, in order to take the recognizance. Take the bail with you, at the time appointed, and the clerk of the errors will take their recognizances (r); pay him 1l. 6s. if at chambers, and 3s. 4d. more if at Westminster or at a Judge's house. Bail in error may also, it seems, be put in before a commissioner, as in other cases in the country (s). It does not seem necessary, nor is it the usual practice, for the plaintiff in error to join in the recognizance (t). As to who and how many may become bail, see *ante*, 149, 150, 168. Where two persons of no property, who were in the habit of allowing their names to be used as bail at Serjeants' Inn, for hire, were put in as bail in error, as is sometimes done in the case of bail upon mesne process, and, no rule for better bail being given, justified; the plaintiff in the action having treated them as a nullity, and issued execution, the Court refused to set the execution aside, saying that the putting in of such bail was a fraud upon the Court (u). But the same persons, who were bail in the original action, may be bail in error, if they be able to justify (v).

After bail has been put in, notice thereof should be given without delay to the defendant in error or his attorney, in the same manner as in ordinary cases is given to the plaintiff; (*R. M. 5 W. & M.*, and see fully *ante*, 154); and care must be taken that this notice be given before the expiration of the four days above mentioned, otherwise the plaintiff in the original action may sue out execution (y). A notice of more than two bail would, it seems, be irregular, unless by leave of the Court or a Judge: (*R. H. 2 W. 4*, r. 18, *ante*, 154).

The plaintiff in error putting in bail as defendant in the action, it should seem that he may, by *R. T. 1 W. 4*, r. 1, justify bail at the same time at which they are put in; and as to the notice for the purpose, and the plaintiff's obtaining time to inquire as to bail, &c. see *ante*, 162, 173. And it should seem that, in such case, if the notice of bail be accompanied by an affidavit of each of the bail, as noticed *ante*, 156, 164, and the bail be excepted to, costs will be allowed as upon the justification or rejection of bail to the action. Also, if the plaintiff in the action do not give one day's notice of exception to the bail by whom the affidavit is made, the recognizance may be taken out of Court upon such affidavit. (*R. T. 1 W. 4*, r. 4; see *ante*, 158, 164).

After notice of bail without such affidavit, the defendant in

(r) See a form of recognizance, Chit. Forms, 227; and of the entry of, Id.

(s) *Manningford v. Parker & Another*, cor. Bayley, B., at chambers, 27th Nov. 1833. It has been said that bail in error cannot be put in before a commissioner, the stat. 4 W. & M. c. 4, s. 1, which authorizes the appointment of commissioners, relating only to bail in actions depending in the Court in which the acknowledgment of the bail is taken; but this seems a mistake, because the bail is not put in in the Court in which the writ of error is brought. See Tidd,

9th ed., citing *Lushington and Doe v. Godfrey*, Barnes, 78.

(t) See *Dixon v. Dixon*, 2 B. & P. 443.

(u) *Ward v. Levi*, 2 D. & R. 421, 1 B. & C. 268, S. C.; and see *Fuller v. Coombe*, 1 Dowl. P. C. 207, 4 M. & P. 792, S. C.; *Broune v. Brown*, 4 Bingham, 38, 12 Moore, 172, S. C.; 2 Chit. Rep. 105.

(v) *Martin v. Justice*, 8 T.R. 639.

(y) *Attenbury v. Smith*, M.S. E. 1821. See the form of notice, Chit. Forms, 208.

error has twenty days allowed him to accept of or except to them; and if he do not except to them within that time, the recognizance will be allowed of course. (*R. M. 5 W. & M.*) (z). If you except to them, it is not necessary to give notice of exception; *obtain from the clerk of the errors a rule for better bail (a); pay him 2s.; and serve a copy upon the plaintiff's attorney.*

After service of the rule for better bail, the plaintiff in error has four days to justify; or if it be in vacation, he has until the first day of the next term (b). But if the bail are excepted to in vacation and a notice of exception be given, requiring them to justify before a Judge, the bail must justify within four days from the time of such notice; (*R. H. 2 W. 4, r. 17; ante, 160*); and if he do not justify within the respective times here mentioned, the defendant may consider the bail as a nullity, and sue out execution (c). Two days notice of justification given before the time of justification is it seems in all cases sufficient. (*R. H. 2 W. 4, r. 16*). The Court will not give a further time to justify, if no real error can be pointed out to them (d), unless under very particular circumstances (e), and the amount of the judgment be deposited in the hands of the master (f).

Bail are added with the clerk of the errors, in the same manner that bail are added in the original action (g). It should seem that the bail, of whom notice has been given, cannot be changed without leave of the Court or a Judge. (*R. T. 1 W. 4, r. 5; ante, 161*). As to the mode in which such leave is to be obtained, *see ante, 161*.

The mode of justifying is nearly the same as in the original action. Give notice of justification to the attorney of the defendant in error, in the same manner as in the original action (h). Make an affidavit of service of the notice of justification, and of the affidavits of sufficiency having been made, if indeed they were so (*see ante, 165*) (i); get the clerk of the errors to attend at Westminster with the bail book; attend there with the bail; and give the affidavit and a motion paper to counsel, who will move to justify. Pay the clerk of the errors 10s.; and the officers of the Court 9s. 6d. Draw up the rule of allowance with the clerk of the rules, the same evening (k); and serve a copy of it on the attorney of the defendant in error. (*See ante, 173*). It has been already remarked that the plaintiff himself does not usually join in the recognizance (l); or if he do, he cannot be examined as to his sufficiency, but his sureties alone are required to justify (m). The sureties justify in double the amount adjudged to be recovered by the former judgment (n): excepting in a case of a

(z) *Gibbons v. Dove*, 3 Salk. 56; Id.

98.  
(a) See the form, Chit. Forms, 208.

(b) *Barnes*, 211.

(c) *Gould v. Holmstrom*, 7 East, 580.

(d) *Handasyde v. Morgan*, 2 Wils. 144.

(e) See *Dyott v. Dunn*, 1 D. & R. 9; *Sparrow v. Sir W. Leves*, 8 Taunt. 126.

(f) *Anon.* 1 Dowl. P. C. 32.

(g) See *ante*, 161; and see the form, Chit. Forms, 208, 76.

(h) See *ante*, 162; and see the form of the notice, Chit. Forms, 209; of adding and justifying, Id. 208, 76; of adding one bail and justifying, Id. 77.

(i) See the form, Chit. Forms, 208, 79, 80.

(k) Id. 208, 82.

(l) See *ante*, 344, and *Dixon v. Dixon*, 2 B. & P. 443.

(m) *Keene v. Deardon*, 8 East, 291.

(n) *Reed & Others, Assignees, v. Cooper*, 5 Taunt. 320. See 3 J. 1, c. 8.



penalty in debt on bond, in which case they are not required to justify in more than double the sum really due and double the costs. *R. H. 2 W. 4, r. 26 (o)*. If either of the sureties do not justify, his name may be struck out, upon application to the Court (*p*). They are considered, however, as bail, and may be proceeded against as such, until they are exonerated: and if proceedings have been had against them on their recognizance, the Court will relieve them only upon the terms of paying the costs (*q*). And in a late case, where the plaintiff in error nonprossed his writ, after the bail were excepted to, but before they justified, and the defendant then sued the bail on their recognizance, the Court refused to allow an *exoneretur* to be entered (*r*).

*Certifying the record.*] After the service of the note of allowance of the writ of error, and before the writ is returnable, and after bail has been put in and the copy of the rule of allowance served, the record must be certified to the Court above; in order to which a transcript or copy of the record must be made out by the clerk of the errors, which is afterwards to be left in the Court above, the record itself being in no case left there (*s*). If the plaintiff in error do not procure the record to be certified within the time above mentioned, the defendant (if he wish to hasten the proceedings) may rule the plaintiff to transcribe; and if he will not, the defendant may sign judgment of *nonpros* (*t*). *Get the rule to transcribe from the clerk of the errors (u); pay him 2s.; serve a copy on the attorney of the plaintiff in error, or on the plaintiff himself (v)*. This is an eight day rule, and the plaintiff in error must procure the record to be certified within eight days exclusive after the service of it, otherwise the defendant may sign judgment of *nonpros* (*x*). This is the only method the defendant has of compelling the plaintiff to proceed with his writ of error; for the defendant cannot transcribe the record (*y*). The attorney of the defendant in error must immediately leave with the clerk of the errors a copy of all the proceedings, from the declaration to the judgment. The clerk of the errors will thereupon send to the plaintiff's attorney for a guinea, in part of the transcript money; and if it be not paid, he will sign judgment of *nonpros*, upon the defendant's attorney producing an affidavit of service of the rule to transcribe. But if paid, he then proceeds to transcribe the record; and when the transcript is completed, he sends to the plaintiff's attorney for the remainder of the transcript money, and if not paid, he will sign judgment of *nonpros*. But if paid, then

(o) See *Serrin v. Muncie*, 2 Str. 821; *Moor v. Lynch*, 1 Wils. 213. As to the amount in which they justify in ejectment, see *R. H. 2 W. 4, r. 27, post*, Vol. 2, title "Ejectment."

(p) *Jones v. Tubb*, 1 Wils. 337; *Tubb v. Tubb*, Say. 58.

(q) *Gould v. Hulmstrom*, 7 East, 580.

(r) *Dickenson v. Heceltine*, 2 M. & S. 210.

(s) 2 Saund. 101 l, m; and see 1 W. 4, c. 70, s. 8.

(t) *Goodright v. Hugoson*, Hardw. 351.

(u) See the form, Chit. Forms, 207.

(v) *Green v. Upton*, Barnes, 410.

(x) See the form of the entry of *nonpros* for not transcribing, Chit. Forms. 210.

(y) *Anon.* 1 Wils. 35.

the clerk of the errors and the defendant's attorney examine the transcript with the roll (upon which the defendant in error must have previously entered the issue, and the other proceedings to judgment inclusive) (z); and the transcript is then annexed to the writ of error. Pay the clerk of the errors 2s. 6d. for examining the transcript; and immediately docket your judgment and carry in the roll. (See ante, 222, 223). Or, if the roll have been already carried in, then get the transcript from the clerk of the errors; take it to the treasury at Westminster, and examine it with the roll; you may leave the transcript there, and the bag-bearer will return it to the clerk of the errors. If the clerk of the errors by mistake omit any part of the record in the transcript, he may afterwards insert it, without applying for leave to do so (a). Either party may have a copy of the transcript; but the defendant's attorney should bespeak one forthwith.

It may be right to observe here, that the plaintiff in error may *nonpros* his own writ, without carrying over the transcript (b); also, that the defendant in error is not entitled to costs in error, upon a judgment of *nonpros*, before the record is certified (c); but if the plaintiff applies to the Court for leave to *nonpros* his own writ, leave will not be granted but on payment of costs (d).

Immediately upon judgment of *nonpros* being signed, the defendant in error may sue out execution.

When the transcript has been examined, the clerk of the errors in this Court will then deliver it to the clerk of the errors in the Exchequer Chamber. The cause is thereby removed into the Exchequer Chamber, and all the future proceedings, to judgment, must be had in that Court.

*Alleging diminution.*] In the term after the plaintiff has transcribed, —or, if the rule to transcribe were not served until the next or some subsequent term to that in which the writ of error was returnable, then in the same term in which the plaintiff has transcribed—the clerk of the errors in the Exchequer Chamber will give you a rule to *allege diminution* (e); pay him 2s. 4d.; serve a copy of it on the plaintiff's attorney. The rule expires in eight days exclusive from the service; and if the plaintiff do not *allege* diminution within that time, (that is, if he do not pay the diminution money to the clerk of the errors), then, upon affidavit of service of the rule, the clerk of the errors will sign a *nonpros*, and tax the defendant his costs; or he will send to the plaintiff's attorney, (which is more usual), and if he do not get an answer the next morning, he will sign a *nonpros*.

*Assignment of errors.*] In the same (f) or a subsequent term after the plaintiff has alleged diminution, the clerk of the errors will give you a rule to assign errors, which will expire in eight days exclusive after service; and a copy thereof being served on the plaintiff's attorney, if he do not assign errors within the time limited by the rule, the

(c) See Chit. Forms, 209.

(a) See *Randole v. Bailey*, 1 M. & Sel. 232; post, 313.

(b) *Milburn v. Copeland*, 1 M. & Sel. 104.

(c) *Salt v. Richards*, 7 East, 110. See

*College of Physicians v. Harriman*, 9 B. & C. 528.

(d) *Wilkinson v. Malin*, 1 Dowl. P. C. 628, 1 C. & M. 240, S. C.

(e) See the form, Chit. Forms, 211.

(f) *Home v. Bentinck*, 1 B. & B. 514.

clerk of the errors will, upon application, sign *nonpross*, and tax the defendant his costs (g). The assignment of errors is engrossed on plain paper and filed with the clerk of the errors, who always receives the assignment of common errors without counsel's signature: indeed, if the common errors be assigned, they are usually prepared by the clerk of the errors; pay him 8s. (h). A special assignment of errors should be signed by counsel.

Errors in law (as errors in fact cannot be assigned upon a writ of error in the Exchequer Chamber, *ante*, 330), are common or special. The common errors are, that the declaration is insufficient in law to maintain the action, and that the judgment was given for the plaintiff instead of the defendant, or for the defendant instead of the plaintiff in the original action (i). It is not sufficient, however, to assign errors so generally as thus: "*quod in omnibus erratum est*;" for the Court are not bound to inquire of the errors, unless pointed out by the party (j). Special errors are the want of a warrant of attorney (k); or any matter appearing on the face of the record, which shows the judgment to be erroneous (l). Several errors may be assigned (m). But the plaintiff cannot assign error in law and error in fact, for these are distinct matters, and require different trials (n): the party may, however, have the benefit of this indirectly, for the Court ought to give judgment of reversal if there be error in law, notwithstanding no error in law is assigned (o). Nor can any thing be assigned for error, which contradicts the record (p); or which was for the advantage of the plaintiff in error (q), unless the error be the default of the Court (r). So, he shall not assign that for error which he might have pleaded in abatement (s), or in bar of the action, as a release (t), or the like, or which was cured by the appearance of the party below (u).

(g) See *Salt v. Richards*, 7 East, 111. See form of rule, Chit. Forms, 211; and see entry of judgment of *non-pross* and *remittitur* to K. B. *Id.*

(h) See the form of assignment of general errors, Chit. Forms, 215.

(i) See 2 Saund. 110q. See the form, Chit. Forms, 215.

(j) 6 E. 4, 6; Ro. Abr. 761; Bro. Attaint, 86.

(k) Formerly, the want of an original writ or bill was a ground of error; but this can now be seldom a ground for error, since the 2 W. 4, c. 39. See the form of the assignment, Arch. Forms, 212.

(l) Tidd, 1078.

(m) F. N. B. 20 E.

(n) Ro. Abr. 761; *Anon.* 1 Sid. 147; 1 Leon. 105; *King v. Gosper*, Yelv. 58; *Burdett v. Wheatly*, 2 Ld. Raym. 863.

(o) *Custledine v. Mundy*, 4 B. & Ad. 90.

(p) Ro. Abr. 764, 757, 758; 1 Ro. Rep. 200; Dy. 89; *Wright v. Mayor and Commonalty of Wickham*, Cro. El. 469, 677; *Arundell v. Arundell*, Yelv. 33, Cro. Jac. 11, S. C.; *Phillips v. Huish*, Id. 12; *Whistler v. Lee*, 2 Bula. 243; *Johns v. Bowen*, Cro. Jac. 597. Palm. 428; *Morris v. Fletcher*, Cro. Car. 53;

*Molins v. Wenby*, 1 Lev. 76; *Mullins v. Weddy*, 1 Sid. 94, S. C.; *Hippoly v. Tuck*, 2 Lev. 184, T. Jones, 81, S. C.; *Ribout v. Wheeler*, Hardw. 106; *Herbut v. Held*, 2 Str. 685, 2 Ld. Raym. 1414, S. C.; *Bradburn v. Taylor*, 1 Wils. 85; and see *Hippesley v. Tuck*, 3 Salk. 249; *Andrews v. Linton*, 2 Id. 834, 1 Salk. 265, S. C.; 2 Bac. Abr. Error, (K) 3.

(q) 5 Co. 39b; 8 Id. 59; Ro. Abr. 769, 784; 1 Ro. Rep. 88; 2 Bulst. 279, 280; 11 Co. 56; 2 Saund. 45; *Kex v. Carlile*, 2 B. & Adol. 362, 971.

(r) 8 Co. 69; *Beecher v. Shirley*, Cro. Jac. 211; 1 Ro. Rep. 759; Ro. Abr. 759, 760; *Crow's case*, Cro. El. 84; *Kent v. Kest*, Hardw. 50, 2 Str. 971, 2 Barnard. 357, S. C.

(s) *Coan v. Bowles*, Carth. 124; *Cowme v. Bowles*, 1 Salk. 93; *Saville v. Thornton*, Cro. Jac. 651, Palm. 306, 311; 1 Ro. Rep. 450; Ro. Abr. 782; *De Tastet v. Rucker*, 3 B. & B. 65; and see *Lampson v. Collingwood*, 1 Salk. 262, 1 Ld. Raym. 27, S. C.; *Wright v. Kitchingman*, 1 Str. 197.

(t) 21 E. 4, 38.

(u) 3 H. 6, 9; Ro. Abr. 779, 780; 3 Bulst. 61; *Thoroughgood v. Scroggs*, Cro. El. 582; *Vaughan v. Flord*, 1 Sid. 406.

Also, the Court have, in some cases, set aside an assignment of errors, when it was evidently calculated merely for delay (*u*).

If there be several plaintiffs in error, they must all join in the assignment of errors, unless some of them have been summoned and severed. (*Ante*, 328).

As to the assignment, whether it must be general or special, this distinction seems to be taken:—you may assign the common errors, if the errors complained of appear upon the face of the record itself; or if in such a case you assign any of these errors specially, counsel will not be confined, in arguing the case, to the error thus assigned, but may support the writ of error by any other error appearing upon the face of the record (*v*). And it is usual, if there really be errors in the record, to assign one of them specially, in order that the clerk, who sets down the cause for argument, may know that it is intended to argue it. But where the error is in an out-branch of the record, as where there is no warrant of attorney, it must be assigned specially, (which is termed “alleging diminution”), and must also be verified upon *certiorari*, otherwise the Court of error will not notice it (*w*).

If the want of a warrant of attorney, or any supposed error or defect therein, be assigned for error, the plaintiff must sue out a *certiorari* to bring such warrant before the Court of error, and have it returned, in order to verify his errors (*x*). The plaintiff in error can have but one *certiorari*; and although that should prove nugatory by error or mistake, the Court will not allow him to sue out another (*y*). Yet the Court itself may, in such a case, *ad informandum conscientiam*, award *ex officio* a *certiorari*, at any time (*z*). The want of a warrant of attorney is aided after verdict (*a*); but if assigned as error after judgment by default, &c., you should file your warrant before the return of the *certiorari*, and the Court in such a case will not inquire what time it was filed (*b*). On this account the assignment of the want of a warrant of attorney as error is deemed vexatious, and assigned merely for the purpose of delay; and the Court, in one instance, even set such an assignment aside upon application (*c*). Many instances are to be found in the old books, of the want of continuances being assigned for error; but discontinuance is now cured after verdict by the stat. of jeofails, 32 H. 8, c. 30 (*d*); and

1 Vent. 7, S. C. See *Roberts v Andrews*, Cro. El. 83; *Style*, 237; *Read v. Wilmott*, 1 Vent. 220, *Ann.* 1d. 249; *Newman v. More*, Cro. Jac. 424; 1 Bulst. 143; *Latch*, 118; *Wickham v. Enfield*, Cro. Car. 351. Bac. Abr. Error, (K), 5.  
(*u*) *Chartres v. Cusack*, 1 Str. 141.  
*Moore v. Goodright*, 2 Str. 809; 2 Saund. 101 *a*; *ante*, 339, 340.

(*v*) 5 Co. 37 *b*; *Farr v. Denn*, 1 Bur. 363.

(*w*) *Graddell v. Tyson*, 2 Ld. Raym. 141.

(*x*) 9 E. 4, 32 *b*; Bro. Error, 90; *Smith v. Stoneard*, 1 Salk. 267, 2 Ld. Raym. 1156, S. C.; 2 Saund. 101 *q r*; and see *Drew v. Rose*, 2 Ld. Raym.

1390.

(*y*) *Merryfield v. Berry*, 2 Str. 765; *Bowers v. Mann*, Id. 819; 2 Saund. 101 *r*.

(*z*) *Franklyn v. Reeves*, Hardw. 118; Ro. Abr. 764; *Yates v. Windham*, Cro. El. 281; *Winchcomb v. Goddard*, Id. 836; 2 Saund. 101 *s*.

(*a*) 32 H. 8, c. 30; 18 El. c. 14; and see 4 & 5 A. c. 16, ss. 2, 3; and *Bradburn v. Taylor*, 1 Wils. 65.

(*b*) See *ante*, 34; and see 4 Taunt. 44. *French v. Carnelys*, 1 W. Bl. 453.

(*c*) *Chartres v. Cusack*, 1 Str. 141.

(*d*) See *Hutman v. Collins*, Cro. El. 489; *Smith v. Bowser*, Cro. Jac. 528; *Sedgewick v. Richardson*, 3 Lev. 374; *Humble v. Bland*, 6 T. R. 255.

after judgment by default, &c., by 4 *A. c.* 16. The *certiorari* is a judicial writ; it is directed to the chief justice of the King's Bench, tested in the name of the chief justice of the Common Pleas, and is sued out with and signed by the clerk of the errors; *pay him 8s. and pay 7d. sealing.* If the plaintiff will not sue out the *certiorari* and cause it to be returned, *you may obtain a rule from the clerk of the errors to oblige him to do so, and serve a copy of it upon the plaintiff's attorney.* And if the *certiorari* be not returned within the time limited by the rule, the clerk of the errors, upon your applying to him, will sign a *nonpross*, and you may sue out execution.

As soon as errors have been assigned, *notice thereof should be given to the defendant*, in order that he may come in and make his defence (*e*).

*Plea, &c.*] To the assignment of errors, the defendant may plead either the common joinder *in nullo est erratum*, or a special plea; or he may demur.

The common joinder (*in nullo est erratum*) alleges that there is no error in the record and proceedings, and prays that the Court may proceed to examine them, and affirm the judgment. It concludes with a *curia advisari vult* (*f*). Where the common errors are assigned, or where special errors are assigned in the body of the record, the effect of this plea is to deny that such errors exist, or, if they do, that they are not such as are in law sufficient to reverse the judgment. But where error out of the body of the record is assigned, as the want of warrant of attorney, this plea amounts to a confession that there is no warrant of attorney, but denies that the want of it is error; and therefore, if the want of a warrant of attorney be assigned for error after verdict, you may immediately plead *in nullo est erratum*, the error assigned having been aided by the verdict; but if it were assigned for error after judgment by default, &c., you must first wait until the expiration of the time for returning the *certiorari*, and then, after entering a *non misit breve*, as mentioned *post*, 360, you may plead this plea with safety, for by not returning the *certiorari*, the special error is relinquished (*g*); or even if pleaded before the time when the *certiorari* should be returned, although in such a case it is an admission of the error assigned, yet the Court may still award a *certiorari ad informandam conscientiam*, (as indeed they may do at any time pending the writ of error, *see ante*, 349), and if a warrant of attorney be returned, they will affirm the judgment notwithstanding the defendant's admission by his plea (*h*). Pleading *in nullo est erratum* has also this effect, that the record is then agreed by all parties to be a true and perfect record, and consequently diminution cannot afterwards be alleged (*i*).

(*e*) *Anon.* 1 Vent. 34: and see Palm. 106.

(*f*) See the form, *Chit. Forms*, 216.

(*g*) See Ro. Abr. 763, 764; 1 Leon. 22; 9 E. 4, 32 *b*; 2 Saund. 101, *s*; and

*ante*, 349.

(*h*) *Ante*, 349; and see Bro. Error, 163; 7 E. 4, 16.

(*i*) *Roberts v. Andvics*, Cro. El. 84; *Beare v. Beacher*, Moor, 700; 1 Leon.

Special pleas also confess the errors assigned, but avoid them by other matter. Thus, to the assignment of errors, the defendant may plead a release of errors; (9 H. 6, 48) (j); and if the release be in the same instrument with a warrant of attorney, and dated on any day in the term of which the judgment is signed, although after the day to which the judgment by law has relation, it will be sufficient (k). It may also be necessary to observe, that if there be two or more plaintiffs in error, the release of errors by one of them will not bar the others (l). So, a release of all suits, is a good plea (m); or a release of actions personal, where the matter in dispute is a debt, damage, or the like; or a release of actions real, where land is in dispute; but, where the plaintiff, by a writ of error, shall not be restored to anything personal or real, a release of all actions, real or personal, is no bar (n). So, if the plaintiff in error have, by release, feoffment, fine, or the like, conveyed his right in the thing in dispute to another, this conveyance may be pleaded by the defendant, and will be a good bar (o). So, the statute of limitations is a good bar, and cannot be taken advantage of in any other manner than by plea (p). But, entry by plaintiff into the lands in dispute, pending the writ, it seems is no plea (q). These pleas in bar must conclude by praying that the plaintiff may be barred of his writ of error, and not that the judgment be affirmed, for they admit the judgment to be erroneous (r). But although they happen to be ill pleaded, yet, if there be really no errors, the Court will affirm the judgment (s). To the plea, the plaintiff may reply or demur, as in ordinary cases.

If the errors be badly assigned, the defendant may, if he will, demur; although in most cases, as we have above seen, the common joinder will answer the same purpose. But where errors in fact and in law are assigned, (which we have seen *ante*, 348, cannot regularly be done), the defendant must demur if he would take advantage of the duplicity; for the common joinder, in such a case, would be an admission of the error in fact, and the judgment would consequently be reversed (t). So, the plaintiff may demur to the defendant's plea the defendant demur to the plaintiff's replication, &c.

*Engross the plea, joinder, &c., on plain paper, and file them with the clerk of the errors (u).* They should be signed by counsel. The

22; *Meredith v. Davies*, 1 Salk. 270; F. N. B. 58, (a).

(j) Ro. Abr. 788. See *Darcant v. Rafter*, 2 Ld. Raym. 1046, 6 Mod. 235, S. C.

(k) *Landm v. Pickering*, 2 Str. 1215.

(l) *Razing v. Rudlock*, 6 Co. 25 a, Cro. El. 648, 649, S. C.; *Blunt v. Smeddon*, Cro. Jac. 116; *Hackett v. Herne*, 3 Mod. 135.

(m) Latch. 110.

(n) Co. Lit. 228b; 8 Co. 152; Ro. Abr. 788; 2 Id. 405.

(o) 9 H. 6, 46; Ro. Abr. 788, 789; 2 Bac. Abr. Error, (L).

(p) *Street v. Hopkinson*, 2 Str. 1055, Hardw. 345, S. C.

(q) *Winn v. Lloyd*, 1 Lev. 72.

(r) *Cunningham v. Ouston*, 1 Str. 127; *Dent v. Langood*, 2 Id. 683; *Street v. Hopkinson*, Id. 1055, 1 Show. 50.

(s) *Carlton v. Mortagh*, 1 Salk. 268, 3 Id. 394, 6 Mod. 113, 200, 2 Ld. Raym. 1005, S. C.; *Meredith v. Davies*, 1 Salk. 270.

(t) Style, 69; *Edmonds v. Probert*, Carth. 338, 339; 2 Bac. Abr. Error, (K 2.). See a demurrer for this cause, 10 Went. 5.

(u) See a form, Chit. Forms.

different clerks of the errors, however, receive, without objection, the common joinder without such signature. If the common joinder be pleaded, the clerk of the errors will prepare it, or the attorney may do so. If a release of errors be pleaded in the Exchequer Chamber, they may try it, and award a *venire* under the seal of the Court of Exchequer.

*Argument.*] After the joinder is filed, either party may get the cause entered for argument. There are but two days in each term, appointed by the Court of Exchequer for the despatch of business: one, usually the third or fourth day of the term, called the general affirmance day; the other, a day or two before the end of the term, called the adjournment day. *The cause must be entered with the clerk of the errors for argument, for either of these days; and if it be intended to be argued, it should, in strictness, be entered ten days before argument. (R. E. 33 C. 2).* Care, however, should be taken to enter it, at least in time for the paper-books to be delivered to the judges; and if you be too late for this, before the general affirmance day, the clerk of the errors will set it down for the adjournment day, upon being paid some additional fee. *If entered for the general affirmance day, pay him 9s. 6d.* Regularly, the cause should be set down for argument by the plaintiff; but if he do not enter it, the defendant may. By the 1 W. 4, c. 70, s. 8, the Court may sit in vacation.

The clerk of the errors will enter the proceedings upon record for you; *pay him according to the length (v); get an office copy thereof from him, for which you pay 8d. per sheet, and serve a copy of it upon the opposite attorney.* The paper-books (being copies of the proceedings to the joinder inclusive, upon unstamped brief paper) must next be made out, and delivered to the Judges four days before argument; the plaintiff must deliver one to each of the Judges of the Common Pleas; and the defendant one to each of the barons; (*R. E. 33 C. 2*); or the clerk of the errors will make them out and deliver them, if required (x).

One counsel is heard for each party: the counsel for the plaintiff first; then the counsel for the defendant; and lastly, the counsel for the plaintiff in reply. If the common errors alone be assigned, the plaintiff's counsel are at liberty to support them, by objections to the record for any error whatever appearing upon the face of it; or if an error upon the face of the record be assigned specially, the counsel are not confined to it, but may make any other error, appearing upon the face of the record, the subject of objection (y). But where an error is in an out-branch of the record, as where there is no warrant of attorney, this cannot be

(v) See the form of the entry, Chit. Forms, 216.

(x) As to the consequence of not delivering the paper books, see *Johnson v.*

*Prescott*, 4 Taunt. 147.

(y) 5 Co. 37 b; *Far v. Denn*, 1 Bur. 363.

objected to by counsel, unless specially assigned (z). As soon as the plaintiff's counsel has replied,<sup>1</sup> the Judges deliver their opinions *seriatim*; and according to the opinion of the majority, the judgment below is either affirmed or reversed. If the Court be equally divided, the judgment shall be affirmed (a). If the case be not argued, counsel must move for judgment of affirmance or reversal.

*Judgment, form and nature of.*] The common judgment for the defendant in error is, that the judgment be affirmed (b). So, on a demurrer to an assignment of errors, the judgment for defendant is *quod affirmetur* (c). But when the defendant has pleaded a release of errors (d), or the statute of limitations (e), and it is found for him, the judgment is that the plaintiff be barred of his writ of error, and not *quod affirmetur*.

As to the judgment for the plaintiff in error: where judgment is given in the Court below against the defendant, and he brings a writ of error, the judgment in the Court of error, if given for him, shall be *quod judicium reverteretur* (f). But if the judgment in the Court below were given against the plaintiff, and he bring a writ of error, and succeed; in such case, the judgment below shall not only be reversed, but the Court of error shall also give such judgment as the Court below ought to have given (g). On a writ of error returnable in the King's Bench, that Court can award a writ of inquiry to assess damages, if necessary, and, upon the return of the inquiry, give final judgment (h). So, if the judgment below were on a special verdict, and the writ of error brought in the Exchequer Chamber, or in parliament, these courts will at once give final judgment (i); but where a writ of inquiry is necessary, in order to assess damages, as these Courts cannot award it, the judgment given by them is *quod recuperet* only, and they remit the transcript to the King's Bench, in order that a writ of inquiry may be awarded by that Court to assess the damages; and final judgment is then given in the Court of King's Bench, upon the return of the inquiry (j).

(z) *Graddell v. Tyson*, 2 Ld. Raym. 1441; and see *ante*, 349.

(a) *Thornly v. Fleetwood*, 1 Str. 381.

(b) Bac. Abr. Error, (M), 2; 21 E. 4, 44; Ro. Abr. 805.

(c) *Jeffrey v. Wood*, 1 Str. 439.

(d) *Dent v. Lingoud*, 2 Str. 683; *Cunningham v. Houston*, 1 Str. 127; *Kerie v. Clifton*, 3 Salk. 214.

(e) *Street v. Hopkinson*, 2 Str. 1055.

(f) *Slucomb's case*, Cro. Car. 442; Ro. Abr. 774; 2 Saund. 256; *Baker v. Laide*, Carth. 253, 254, 1 Salk. 262, 263.

(g) Ro. Abr. 774, 805; *Slucomb's case*, Cro. Car. 442, Yelv. 47; *Cole v. Greene*, 1 Lev. 310; 2 Saund. 256, 317; *Show*.

P. C. 57; *Parker v. Harris*, 1 Salk. 262; *Butcher v. Porter*, Carth. 243; *Baker v. Laide*, Id. 254; *Phillips v. Berry*, 1 Ld. Raym. 5, 1 Salk. 403, 4 Mod. 106, Skin. 447, S. C.; 2 Bac. Abr. Error, (M), 2; *Croly v. Hoskins*, Cro. Car. 509; *Mulberry v. Fyres*, Id. 512; *Clements v. Waller*, 4 Bur. 2156; *Cuming v. Sibly*, Id. 2490; *Wyvill v. Stapleton*, 1 Str. 617.

(h) 2 Saund. 101 v.

(i) *Denn ex dem. Mellor v. Moore*, 1 B. & P. 30, 5 T. R. 558, S. C.; Carth. 319, Skin. 514; *Phillips v. Berry*, 1 Salk. 403, 1 Ld. Raym. 5, S. C.; Id. 10.

(j) *Faldowe v. Ridge*, Cro. Jac. 206,



A judgment being an entire thing, cannot regularly be reversed for part, and affirmed for the residue (*k*). Thus, where an action is brought for a croft and a message, in one count, and, upon error, it is holden that the action does not lie of a croft, the judgment must be reversed both as to the croft and the message (*l*). So, if in action against several, one judgment be given against all, and, upon error, it is holden that the judgment is erroneous as to one, it shall be reversed as against all (*m*). So, if there be but one judgment upon several issues or counts, if it be erroneous as to one issue or count, it shall be reversed as to all (*n*). But where there are more judgments than one, then if they be distinct and independent of each other, the reversal of one will not affect the other. But if they be dependent, (as for instance, in the case of debt or *scire facias* on a judgment), if the first judgment be reversed for error, the judgment in debt or *sci. fa.* is also thereby reversed; but, if merely the judgment in the action of debt or *sci. fa.* be reversed, this does not affect the first judgment (*o*). Or even if there be but one judgment, and it consist of several distinct and independent parts, it may be reversed as to one part, and remain good for the remainder; thus, where judgment in a *sci. fa.* gives damages for delay of execution, the judgment may be reversed as to the damages alone (*p*). So, in a *qui tam* action, where judgment was given for damages as well as for the penalties, it was reversed as to the damages (*q*). So, where costs were awarded by a judgment against executors on a *sci. fa.*, the judgment was reversed as to the costs, and affirmed for the residue (*r*). So, if judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for defendant on another, if the defendant bring a writ of error on the first count, the Court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record (*s*).

*Interest.*] Where the defendant below brings error, and the judgment is affirmed, the counsel for defendant in error should immediately move the Court of Exchequer Chamber that interest may be allowed from the time of signing the judgment below, until affirmance (*t*); otherwise the clerk of the errors will not be justified in allowing it, when he taxes the costs. Notice of this motion should be

Yelv. 74, 76, S. C.; Noy. 129, 1 Show. 127; *Kent v. Kent*, Hard. 51.

(*k*) See *Rolls v. Germin*, Moor. 366, Cro. Eliz. 425, S. C.; Noy. 117, 2 Leon. 178; 2 Ro. Rep. 136; *Parker v. Harris*, Carth. 235; 2 Bac. Abr. Error, (M), 1; *Cutting v. Williams*, 1 Salk. 24, 2 Ld. Raym. 825, S. C.

(*l*) 1 Ro. Rep. 2, 2 Bulst. 214, Alleyne, 74; Ro. Abr. 774; *sed vide Doe d. Laurie v. Dyeball*, 8 B. & Cress. 70, 1 M. & P. 330, S. C.

(*m*) Ro. Abr. 776; *Bird v. Orms*, Cro. Jac. 289; Alleyne, 74, 75; Style, 121, 125,

406.

(*n*) *Parker v. Harris*, Carth. 234, 4 Mod. 76, 1 Salk. 262, 2 Vent. 249, 270, S. C., 2 Bac. Abr. Error, (M), 1; but see 6 Taunt. 625, *semb. cont.*

(*o*) 2 Bac. Abr. Error, (M), 1; *Canning v. Wright*, 2 Ld. Raym. 1532, 2 Str. 807, S. C.

(*p*) *Wright v. Canning*, 2 Str. 807.

(*q*) *Frederick v. Lookup*, 4 Bur. 2018.

(*r*) *Hellen v. Aylmer*, 1 Str. 189.

(*s*) *Campbell v. French*, 6 T. R. 200.

(*t*) *Welford v. Davidson*, 4 Bur. 2127; and see *Bodily v. Bellamy*, 2 Bur. 1096.

previously given to the attorney for the plaintiff in error (a); and upon producing an affidavit of the service of it, and an affidavit stating the recovery in the original action and the writ of error, the Court will grant a rule absolute in the first instance (b). Formerly it was entirely in the discretion of the Court, whether interest should be allowed or not (c). But now, by the recent statute 3 & 4 W. 4, c. 42, s. 30, "if any person shall sue out any writ of error upon any judgment whatsoever given in any Court in any action personal, and the Court of error shall give judgment for the defendant thereon, then interest shall be allowed by the Court of error for such time as execution has been delayed by such writ of error, for the delaying thereof." It will be observed, that this enactment extends to all judgments in error, and is not confined to judgments of affirmance (d); also, that it is imperative.

*Costs.*] Where the judgment in the Court below is given for the plaintiff, and the defendant, before execution had, sues out a writ of

(a) See the form, Chit. Forms, 217.

(b) See the form of the affidavit to ground the application, Chit. Forms, 218. See the form of the rule, Id.

(c) *Shepherd v. Mackreth*, 2 H. Bl. 264. They would allow it in covenant on a charter-party for stipulated freight; (see *Martin v. Emmote*, 6 Taunt. 530, 2 Marsh. 230, S. C.); or on a contract to replace stock and pay the dividends; (*Dwyer v. Gurry*, 7 Taunt. 14); or on a contract to give a mortgage; (*Anon.* 4 Taunt. 876); or on a contract to indemnify the acceptor of a bill of exchange; (*Furlonge v. Rucker*, 4 Taunt. 250); but not on a contract to sell goods, (*Bristow v. Waddington*, 2 New Rep. 355), nor for goods sold, unless they were to have been paid for by a bill at a certain date, of the like; (*Middleton v. Gill*, 4 Taunt. 208; and see 7 Id. 244, 3 Price, 250, S. C.); nor in an action upon an attorney's bill; (*Walker v. Bailey*, 2 B. & P. 219); nor for money lent, generally; (*Gwyn v. Goddy*, 4 Taunt. 346); but for the balance of a banker's account, upon which interest was usually charged by the banker, (Id.), or upon the balance due by the banker, if it were the custom of the banker to allow interest upon sums deposited with him, but at the rate of interest he was used to allow; (*Stiles v. Bradley*, 8 Taunt. 250, 2 Moore, 206, 3 Price, 536, S. C.); or for the balance of merchants' accounts, even although interest should form one of the items in them, (*Hammel v. Abel*, 4 Taunt. 296), they would allow it. In an action against bail on their recognizance, the Court refused to allow interest; (*Anon.*

4 Taunt. 722); so in an action on a replevin bond; (*Anon.* 4 Taunt. 30); so upon a suggestion of breaches of the condition of a bond, under 8 & 9 W. 3, c. 11, s. 8. (*Johnes v. Jones*, 5 Taunt. 656). In trover for bills of exchange, they allowed interest from the date of final judgment upon such bills as had been paid before judgment, and upon all such as had been paid afterwards from the time when they were paid. (*Atkins v. Wheeler*, 2 New Rep. 205). If the declaration contained several counts, and some were for liquidated damages, upon which interest might be allowed, yet, if there were also a count for unliquidated damages, and a general judgment were given, the Court would not allow interest on either. (*Powell v. Saunders*, 5 Taunt. 28; *Martin v. Emmote*, 6 Taunt. 530, 2 Marsh. 230, S. C.) Besides the several cases above mentioned, in which the Court would allow interest, it seems to have been a general rule that the Court would allow interest in all cases where the writ of error was evidently brought for the purpose of delay, and where the Court, upon application, would have allowed the defendant in error to sue out execution pending the writ. (See *Sassaby v. Moor*, 3 Taunt. 51; and see *ante*, 339, 340). -

(d) Before this enactment, the Court allowed the defendant in error interest where the plaintiff was nonprossed, in the same way as if the judgment were affirmed, provided the original action were such as the Court would allow interest upon such affirmance. *Spicer v. Harrison*, 1 B. & P. 29.

error; if the judgment be affirmed, or the writ of error be discontinued in default of the party, or the plaintiff in error be nonsuit, the defendant in error shall, at the discretion of the Court, recover his costs and damages for the delay, &c. (3 H. 7, c. 10, enforced by 19 H. 7, c. 20).

This statute has been holden not to extend to cases where the writ of error is nonprossed before the record is transcribed by the clerk of the errors (e); nor to cases where the writ of error has been sued out *after* execution (f); nor is an avowant in replevin a plaintiff within the meaning of this act (g). But it includes cases where no costs were recoverable in the original suit (h). Where an executor brings error on a judgment after a *devastavit* (i), or even on a judgment as to the debt *de bonis testatoris*, and as to the costs *de bonis testatoris, et si non de bonis propriis* (k), he shall pay costs, if the judgment be affirmed; but he is not chargeable with costs in error, where he brings error on a judgment recovered against his testator (l). Also, by 13 C. 2, st. 2, c. 2, s. 10, if a judgment given *after verdict* be affirmed in error, the defendant in error shall have *double costs*. This statute does not leave it to the discretion of the Court to award costs or not; but the Court are bound to give double costs to the defendant in error, in all cases within it (m). It extends, however, only to cases where error is brought by the defendant below, to reverse a judgment obtained by the plaintiff (n). But the Court will not give a party leave to *nonpros* his own writ of error, without payment of costs (o).

Where judgment is given for the *defendant* in a Court of record, and the plaintiff thereupon brings a writ of error, if the judgment be affirmed, or the writ of error be discontinued, or the plaintiff be nonsuit, the defendant in error shall have judgment to recover his costs, and may have execution for the same by *ca. sa.*, *fi. fa.*, or *elegit*. (8 & 9 W. 3, c. 11, s. 2) (p).

None of these statutes extend to the *reversal* of a judgment. Therefore, where judgment is reversed, each party pays his own costs in error; but the prevailing party shall have his costs in the

(e) *Salt v. Richards*, 7 East, 111.

(f) See *Res v. Inhabitants of Madley, Staffordshire*, 2 Str. 1190, Cro. Jac. 636; Cro. Car. 173.

(g) 2 Doug. 709, n.; *Golding v. Dias*, 10 East, 2.

(h) *Burgess v. Rawlinson*, 2 Str. 1084, 3 Bur. 1511.

(i) *Cannell v. Norman*, 2 Str. 977.

(k) *Williams v. Riley*, 1 H. Bl. 566.

(l) *Saltern v. Wynne*, 2 Str. 1072, Hardw. 367, S. C.

(m) *Shepherd v. Mackreth*, 2 H. Bl. 284.

(n) *Baring v. Christie*, 5 East, 545.

(o) *Wilkinson v. Malin*, 1 C. & M. 240.

(p) The words of this act are, "If at any time after judgment given for

the *defendant*, in any action, plaint, or suit, in any court of record, the plaintiff or demandant shall sue any writ or writs of error, to annul the said judgment, and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit therein, the defendant in error shall have judgment to recover his costs against the plaintiff or demandant, and have execution for the same, by *capias ad satisfaciendum*, *fi. facias*, or *elegit*." See *Ricketts v. Lewis*, 1 B. & Adol. 197; *Golding v. Dias*, 10 East, 4. By R. M. 2 W. 4, Exchequer, the costs of proceedings on writs of error from the Exchequer to the Exchequer Chamber are to be taxed by the Master of the Court of Exchequer.

original action, as the Court of error must give the same judgment which ought to have been given by the Court below (i).

*Judgment, &c. signing of.*] Four days exclusive after the affirmance, the clerk of the errors will sign judgment, and tax your costs (j). An entry of the affirmance, &c. must then be made on the judgment roll (k); pay 5s. for making the entry to the clerk of the errors, who will receive it for the clerk of the treasury.

*Execution.*] As execution must issue out of the King's Bench, after the transcript, &c. is remitted, and the entry made on the judgment roll as above mentioned, execution by *fi. fa.*, *ca. sa.*, or *elegit*, may be sued out of that Court (l). The execution is sued out in this Court, as in ordinary cases; and the transcript must be remitted to this Court, before the writ of execution is sued out, or at least before it is returnable, otherwise the writ of execution may be set aside for irregularity (m). Where one of two defendants brought a writ of error in the Exchequer Chamber, it was holden that the plaintiff could not charge the other defendant in execution, until the transcript was remitted to this Court (n). Before your writ of execution is returnable, therefore, apply to the clerk of the errors in the Exchequer Chamber for the transcript, and take it to the treasury of the King's Bench, and file it there; pay 2s. 6d.

*Restitution.*] If the judgment below be reversed, the plaintiff in error shall have a writ of restitution, in order that he may be restored to all he has lost by the judgment (o). If execution on the former judgment have been actually executed, and the money paid over, the writ of restitution may issue without any previous *scire facias*; but if the money have not been paid over, a *scire facias quare restitutionem non*, suggesting the matter of fact, viz. the sum levied, &c. must previously issue (p).

Besides this writ of restitution, the Court, upon application, will oblige the defendant to enter into a rule not to commit waste pending the writ of error, if the justice of the case require it (q).

### 3. Writ of error to the House of Lords, after affirmance or reversal in the Exchequer Chamber.

After the judgment of the Court of King's Bench has been affirmed

(i) *Gillhard v. Gladstone*, 12 East, 668; *Wyed v. Stapleton*, 1 Str. 617; *Bell v. Potts*, 5 East, 49.

(j) See a form of affirmance, with remittitur to the King's Bench, Chit. Forms, 219; of reversal upon a writ of error by a defendant, Id., 221; or upon a writ of error by a plaintiff in an action of debt, Id.; or any other action, Id., 222; and of the writ of inquiry in this latter case, Id., 223.

(k) See the form, Chit. Forms, 223.  
(l) See the forms after a nonpross, Chit. Forms, 214; after affirmance,

Id. 221; after reversal, Id., 224.

(m) *Hazard v. Pitt*, 1 Salk. 261; and see Carth. 236, 237.

(n) *Laroche v. Washbrough*, 2 T. R. 737.

(o) *Simpson v. Juron*, Cro. Jac. 690; 1 Ld. Raym. 427; 1 Salk. 321. See the form of the writ, Chit. Forms, 225.

(p) *Anon.* 2 Salk. 588. See the form, Chit. Forms, 226; and see Lil. Ent. 641, 650, and post, title "Execution;" and see 2 Saund. 101 p. 68; 2 Bac. Abr. Error, (M), 3.

(q) *Wharod v. Smart*, 3 Bur. 1823.

or reversed in the Court of Exchequer Chamber a writ of error may be brought upon the judgment of affirmance, &c. returnable in the House of Lords (r).

*The writ, and how sued out.*] The writ of error in this case is directed to the chief justice of the Court of King's Bench; because the record remains in that Court, and is made returnable *immediate* before the king in his present parliament, if the parliament be then sitting(s), or, after a prorogation, then before the king in his parliament, at the next session (t), or, after a dissolution, then before the king in his next parliament, specifying the day on which it is to be holden (u). *Make out a præcipe for the writ (x); take this to the cursitor of the county in which the venue is laid in the original action, who will make out the writ, and get it sealed at the next general seal, or, (if expedition be requisite) at a private seal, having first procured a warrant from the crown for that purpose. Pay 6l. 15s. 6d.; and 8s. 6d. more if the writ were sealed at a private seal (y).*

*Allowance of it, and how far a supersedeas.*] *Take the writ to the clerk of the errors of this Court, who will allow it, and give you a note of the allowance (z); pay him 4l. Make a copy of the note, and serve it upon the attorney of the opposite party, at the same time shewing him the original.* How far the allowance of the writ is a supersedeas of execution, see *ante*, 336 to 340. The Court have refused to allow execution to be sued out, merely because the plaintiff in error suffered judgment to be affirmed in the Exchequer Chamber without objection, and then brought error in parliament (a).

*Bail.*] Bail must again be put in, notwithstanding bail having been already put in to the former writ of error (b). It is put in in this Court, and justified, &c. in the manner mentioned *ante*, 341 to 346 (c).

*Certifying the record.*] *Rule the plaintiff to transcribe, and let the transcript be prepared and examined, as directed ante, 346 (d). Get the rule to transcribe from the clerk of the errors (e); pay him 2s.; serve a copy on the attorney of the plaintiff in error, or on the plaintiff himself (f). Let the transcript be made up (g).*

(r) 1 W. 4, c. 70, s. 8, and the prior cases, 1 Vent. 334, T. Raym. 330; T. Jones, 99.

(s) 2 Sellon, 395.

(t) Lill. Ent. 248, 254.

(u) 1 Vent. 81, 266; *Sedgewick v. Goffson*, 1 Mod. 106.

(x) See the form, Chit. Forms.

(y) See the form of the writ, Chit. Forms.

(z) See the form, Chit. Forms.

(a) See *ante*, 340.

(b) *Tilly v. Richardson*, 1 Salk. 97, 2 Ld. Raym. 840, S. C.; *Colebrook v.*

*Diggs*, 1 Str. 527.

(c) See the form of the note of bail, Chit. Forms; of the notice of bail, Id.; of the rule for better bail, Id.; of the notice of justification, or of adding and justifying, Id.; of the affidavit of service of notice of justification, Id.; and of the rule of allowance, Id.

(d) See Chit. Forms.

(e) See the form, Chit. Forms.

(f) *Green v. Upton*, Barnes, 410.

(g) See the form of the chief justice's return, Chit. Forms; and of the entry of *nonproes* for not transcribing, Id.

When the transcript has been completed, examined, and annexed to the writ of error, the Chief Justice of this Court goes in person, attended by the clerk of the errors, to the House of Lords, with the record itself and the transcript. The latter, after being examined with the record, is left there; but the record is immediately brought back to this Court, in order that execution may be awarded here, if the judgment be affirmed in the Court above (*h*). The Chief Justice's fee is 4*l*.

By an order of the House of Lords, 13th July, 1678, writs of error in parliament shall be brought in (that is, the record shall be certified) within 14 days from the first day of the session in which such writs shall be returnable; unless it be upon judgments given during the session; in which case the writ must be brought in within 14 days after the judgment is given; otherwise such writs shall not be received (*i*).

*Assignment of errors.*] By an order of the House, 13th Dec. 1661, if the plaintiff do not assign errors within eight days after the removal of the record, the clerk of parliament, upon request of the defendant, shall record that the plaintiff hath not prosecuted his writ of error; and the house will thereupon award that the plaintiff shall lose his writ, that the defendant shall go without day, and that the record be remitted. The practice, however, in order to compel the plaintiff to assign errors, is, to draw up a petition to the House, stating the judgment and writ of error shortly, and that plaintiff has not as yet assigned errors, and praying that the transcript may be remitted, in order that the defendant may have execution thereon (*j*). Get a peer to present this, and to move that a day be given the plaintiff to assign errors; upon which, the House will make an order that unless the plaintiff assign errors on or before a day therein specified (usually eight days from the date of the order) the transcript shall be remitted to the Court below. Call the next day at the office of the clerk in parliament, where the order will be drawn up and given to you (*k*); serve it, without delay, on the plaintiff's attorney; and if the plaintiff do not assign errors within the time limited in the order, call at the office of the clerk in parliament, and he will sign judgment of nonpros and enter a remittitur, and the defendant in error will be entitled to his costs (*l*).

The assignment of errors is engrossed on plain paper, and should, if special, be signed by counsel. (*Ante*, 348, 352). File it in the office of the clerk of parliament. As to what may be assigned for error, &c. see *ante*, 348, 349 (*m*).

(*h*) 2 Saund. 101 *m*; 4 Inst. 21; Cro. Jac. 341; Ro. Abr. 753; 1 Bulst. 166; Godb. 249; and see *Vicars v. Haydon*, Cowp. 843.

(*i*) 1 Cornyns, 420; Bunb. 64.

(*j*) See the form, Chit. Forms.

(*k*) Id.

(*l*) See the form of the judgment of nonpros and remittitur, Chit. Forms.

(*m*) See the form of the assignment of common errors, where the judgment in K. B. was affirmed in the Exchequer Chamber, Chit. Forms; and common joinder thereto, Id.; of the assignment

If, in consequence of the writ of a warrant of attorney being assigned for error, (*see ante*, 349), a *certiorari* become requisite upon the plaintiff's praying a *certiorari*, the clerk of parliament shall enter an award thereof accordingly; and the plaintiff, before *in nullo est erratum* pleaded, may sue forth the *certiorari* in ordinary course, without special petition or motion to the house for the same; and if he shall not prosecute such writ, and procure it to be returned within ten days next after his plea of diminution put in, then, unless he shall shew good cause for enlarging the time for the return of such writ, he shall lose the benefit of the same, and the defendant may proceed as if no such writ of *certiorari* was awarded (*n*). Or if the house be about to rise, then, upon petition, (of which two days' previous notice must be given), they will order the plaintiff in error to return the *certiorari* within a less time (*o*). Also, when the *certiorari* is thus awarded, before *in nullo est erratum* pleaded, the clerk of parliament, upon request, shall give a certificate that diminution is so alleged, and a *certiorari* prayed and awarded thereupon (*p*). The *certiorari* in this case is an original writ, and is made out by the cursitor; care should be taken that it do not bear *teste* before the assignment of errors (*q*). It is directed to the chief justice. It is made returnable without delay. If the *certiorari* be not returned and filed within the time given for that purpose, the defendant may enter a *non misit breve*, plead *in nullo est erratum* (*r*), and proceed to affirm the judgment, without noticing the diminution alleged (*s*).

As soon as errors have been assigned, and the *certiorari* (when necessary) has been sued out and returned, the plaintiff in error (if he be desirous of expediting the cause) may get a peer to move that the defendant may appear and make his defence. An order is made accordingly, and must be served upon the defendant's attorney; and the defendant must then plead or demur within the time specified in the order. This, however, is very seldom necessary; for the defendant in error usually comes in voluntarily and pleads or demurs to the assignment of errors, without being ordered to do so. To the assignment of errors the defendant pleads either the common joinder *in nullo est erratum*, or a special plea or demurrer, as directed *ante*, 350, 351 (*t*). These should be filed with the clerk of the parliament and signed by counsel: though both the as-

of common errors, where the judgment of K. B. was reversed in the Exchequer Chamber, *Id.*: and common joinder thereto, *Id.* 223: of the judgment of *non pro* for not assigning errors, *Id.* 230; and of the entry thereof upon the roll, *Id.*

(*n*) Ord. D. P. 13 Dec 1661.

(*o*) Tidd, 1081.

(*p*) Ord. D. P. 21 February, 1710.

(*q*) *Bowers v. Man*, 2 Ld. Raym. 1554, 2 Str. 819, S. C.

(*r*) See the form, Chit. Forms, 233.

(*s*) 2 Sellon, 378; *Smith v. Stoneard*, 1 Salk. 267, 2 Ld. Raym. 1156, S. C. See the form of the entry, Chit. Forms, 235.

(*t*) See the reference to the forms in note (*n*), *supra*.

signment of common errors and the common joinder are received by him without counsel's signature. (*See ante*, 348, 352).

*Argument.*] After the joinder is filed, either party may get a peer to move that the cause may be set down for hearing; which will be ordered accordingly; and it will then be set down in the list of writs of error and appeals, and called on afterwards in its turn. But if either party wish to have the cause argued out of its turn, he must petition the House for that purpose (giving two days' previous notice to the opposite party), and get a peer to present it, and to move that it be referred to a committee; whereupon, if the committee be of opinion that the reasons alleged in the petition are sufficient, and report to the House accordingly, the House will then appoint a day for the hearing (x). The day for hearing, once appointed, cannot be altered, nor the cause set down for argument out of its turn, unless upon petition, as here directed; and oath must be made, at the bar of the House, of the service of notice on the opposite party (y).

The next thing requisite is, that each party shall have his case drawn up and signed, either by the counsel who were engaged in the action in the Court below, or by those who are to argue it in parliament (z); and 250 copies of each case must be delivered at the parliament office, for the use of the peers.

When the cause is called on, the senior counsel for the plaintiff is first heard; then the plaintiff's second counsel, (not more than two counsel on each side being allowed to address the House); next, the two counsel for the defendant are heard, in their order of precedence; and, lastly, the plaintiff's senior counsel is heard in reply (a). As soon as the plaintiff's counsel has replied, the Lord Chancellor then delivers his opinion on the case, and moves that the judgment be either affirmed or reversed. The other peers afterwards, if they wish, deliver their opinion; and the affirmance or reversal of the judgment is decided by the votes of peers present, no proxies in this case being allowed. If the votes be equal, the judgment is affirmed (b).

*Judgment, &c.*] As to the judgment on a writ of error, *see ante*, 353. As soon as the judgment of reversal or affirmance is given, the clerk of parliament will draw up a *remittitur*, and the transcript is thereby remitted to the Court of King's Bench, where execution must be awarded (c).

*Costs.*] As to costs in error generally, *see the former division of this subject*, namely, error from the Court of King's Bench to the Exchequer Chamber, *ante*, 356. In the House of Lords, they give sometimes very large, sometimes very small costs, in their discretion, according to the nature of the case, and the reasonableness or un-

(x) *See the form of the petition*, Chit. Forms, 233; and order, *Id.* 234.

(y) Ord. D. P. 22 Dec. 1703.

(z) Ord. D. P. 19 April, 1698.

(a) *See* Ord. D. P. 2 March, 1727.

(b) *Thornby v. Fleetwood*, 1 Str. 381.

(c) *See Vickers v. Haydon*, Cowp. 843, and *ante*, 357; and *see a form of the entry of the proceedings in the House of Lords, and of the affirmance there, with a remittitur to the King's Bench*, Chit. Forms, 235.



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reasonableness of litigating the judgment of the Court below (*d*). And if the House of Lords do not award costs, this Court can in no case supply the defect by awarding them after the transcript is remitted (*e*).

*Execution.*] The prevailing party may get the transcript and *re-mittitur* at the office of the clerk of parliament, upon paying the fees, and he should then file it with the clerk of the treasury of the King's Bench. The execution may be by *fi. fa.*, *ca. sa.*, or *elegit* (*f*).

As to restitution, and *scire facias quare restitutionem non*, see *ante*, 357; and *post*, 363.

### 4. *Writ of Error from inferior Courts to the Court of King's Bench.*

As to the cases in which a writ of error lies from inferior Courts to the Court of King's Bench, see *ante*, 330, 331.

*The writ.*] The writ is directed to the Judges of the inferior Court (except, that in the county palatine of Lancaster it is directed to the Chancellor (*g*),) in which the judgment was given, and is made returnable on the first or last general return of the term, where-soever, &c. (*h*).

*How sued out, &c.*] Make out a *præcipe* for the writ (*i*). Take it to the Cursitor, as directed *ante*, p. 336, and he will make out the writ; pay him 1*l.* 10*s.* 6*d.*; and if sealed at a private seal, 8*s.* 6*d.* more. And the clerk of the errors, or other proper officer of the Court below, will allow it. Serve the copy of the note of allowance, as directed, *ante*, p. 336.

*Bail.*] The statutes 3 J. 1, c. 8; 13 C. 2, st. 2, c. 2; 16 C. 2, c. 8; and 6 G. 4, c. 96, relating to this subject, mentioned *ante*, p. 341, 342, relate only to the courts of record at Westminster, and in the counties palatine. But by 19 G. 3, c. 70, s. 5, (*ante*, 341), the like bail is required in all cases of writs of error brought to reverse judgments in inferior courts, when the damages are under 10*l.* (since extended to 20*l.* by 7 & 8 G. 4, c. 71, s. 6); and the bail are liable absolutely, if the judgment below be affirmed, or the writ of error nonprossed.

The bail is put in and justified, as in ordinary cases, according to the usage and practice of the inferior court.

*Certifying the Record, &c.*] Upon the return of the writ of error, or upon bail being put in and perfected, the defendant in error should serve the plaintiff with a rule out of the inferior court, to transcribe;

(d) *Bodily v. Bellamy*, 2 Bur. 1007.

(e) *Boale v. Thompson*, 2 M. & S. 246.  
See *Frith v. Leroux*, 2 T. R. 56.

(f) See the form of a *fiert facias* after affirmation, Chit. Forms, 237; of a *capias ad satisfaciendum*, after affirm-

ance, *Id.*; and of *fi. fa.* or *ca. sa.* after reversal, *Id.* 236.

(g) See, as to the form, Chit. Forms, 236.

(h) See a form, Chit. Forms, 234.

(i) See the form, Chit. Forms, 238.

and the plaintiff should thereupon bespeak the transcript of the proper officer below, and, when complete, take it to the signer of the writs in this court. The return is usually signed by the Judge of the inferior court. The transcript must be delivered to the signer of the writs before the second seal, otherwise the defendant in error may obtain a certificate from that officer, that the writ of error is not returned, nor the transcript brought in; and upon producing such certificate to the cursive, he will make out for him a writ *de executione judicii*, directed to the Judges of the Court below, commanding them to proceed on the judgment, notwithstanding the writ of error (*k*).

Although the record in this case is supposed to be removed, and formerly, perhaps, was so actually (*l*), yet it is now usual for inferior courts to send only the transcript of the record, and not the record itself (*m*). Execution, however, is always sued out in this Court, even where the writ of error is nonprossed (*n*).

Where on a writ of error to the King's Bench from the Common Pleas, before the 1 W. 4, c. 70, the clerk of the errors in the latter Court omitted a special memorandum, in making out the transcript, and after errors assigned for want of such memorandum, amended the transcript by inserting it, the Court of King's Bench refused to order the transcript to be restored to the state in which it was when the plaintiff assigned his errors (*o*).

*Scire facias quare executionem non.*] After the record is certified, the plaintiff in error should immediately assign his errors. If he do not, the defendant may compel him by a *scire facias quare executionem non* (*p*), which may be sued out immediately after the transcript is brought in, although that happen to be previous to the expiration of the rule to transcribe (*q*). Or it may be sued out immediately after the expiration of the rule to transcribe, although the transcript be not then actually brought in (*r*). As this is used merely for the purpose of compelling an assignment of errors, (no day in Court being given to the parties), the plaintiff, it seems, is not permitted to plead to it (*s*); but he satisfies the intention of it by assigning his errors; and having done so, the proceedings on the *scire facias* cease (*t*). It should be here remarked that where a plaintiff brings a writ of error, in order to reverse his own judgment, this writ is of course unnecessary (*u*).

The *scire facias* is a judicial writ issuing from this Court, and, except in error from the Court of Lancaster or Durham, is directed

(*k*) *Anon.* 3 Salk. 146; 2 Sellow, 388.

(*l*) See 50 Ass. 9. Ro. Abr. 753; 1 Bulst. 181.

(*m*) 2 Saund. 101 m.

(*n*) See *Cueperthwaite v. Owen*, 3 T. R. 657.

(*o*) *Randole v. Bailey*, 1 M. & S. 232.

(*p*) *Lynch v. Coot*, 3 Salk. 144; Carth. 40, 41.

(*q*) *Sambridge v. Housley*, 2 T. R. 17.

See Lutw. 354; F. N. B. 20 (G).

(*r*) *Branscombe v. Hughes*, 15 East, 646.

(*s*) *Parker v. Stanton*, 2 Str. 679, 2 Ld. Raym. 1414, S. C.; but see Yelv. 6, 7; Carth. 41; *Gardner v. Claxton*, 1 Str. 390.

(*t*) See 2 Saund. 101 p.

(*u*) *Johnson v. Jobb*, 3 Bur. 1772, post, 363.

to the Sheriff of the county where the jurisdiction of the inferior court extends. It must be tested and returnable in term. If the transcript have been brought in before the essoign day of the term, it may it seems be tested on the last day of the preceding term (v); if brought in afterwards or during the term, it may be tested on the first day of that term (w); and unless the action were brought by original writ in the Court of Lancaster or Durham (in which case the writ should be returnable on a general return day wheresoever, &c., and have fifteen days between the teste and the return), it must be returnable on a day certain (x), and it is not necessary that there should be fifteen days between the teste and return.

*Ingross the writ on a plain piece of parchment (y); take it, together with a præcipe, to the signer of the writs, pay 1s. 8d. for signing; get it sealed, pay 7d. Then take it (unless it be directed to the Chancellor of Lancaster or Bishop of Durham, in which case its execution must be procured as that of other writs similarly directed,) to the Sheriff's office; and the plaintiff in error will be summoned, or, if not, nihil will be returned: pay the sheriff, if nihil be returned, 1s. for each name; or if left for a scire feci, as is now most usual, pay 2s. 6d. for the warrant, and for the return 2s. each name, and 5s. to the officer. It is not necessary that the sci. fa. should lie four days in the sheriff's office before the return, as in the case of a sci. fa. against bail (z).*

*Upon the quarto die post of the return of the sci. fa., if the action were by original in the Court of Lancaster or Durham (a), or otherwise on the return day, when the plaintiff has been summoned, draw up a rule to appear with the clerk of the rules (b); pay him 6d.; and serve a copy of it upon the plaintiff's attorney. This rule expires in four days after service, exclusive of the day it is given; and if the plaintiff do not assign errors within that time, you may enter up judgment on the scire facias, and sue out execution (c). If the writ be returned nihil, judgment cannot be signed until after eight days from the return, and then not without leave of the Court or a Judge (d). The writ of error is not determined by such judgment, nor are you in such a case entitled to costs in error. In order, therefore, to obtain costs, you must proceed to nonpros the writ of error (e). For this purpose, obtain from the Master a rule to assign errors on the back of the draft sci. fa. (f); enter it with the clerk of the rules, and pay 6d.; and serve a copy on the plaintiff's attorney. This rule, it must be observed, cannot be given before the expiration of the rule to appear on the scire facias (g). This rule also expires in four days exclusive; and if the plaintiff in*

(v) *Sambridge v. Housley*, 2 T. R. 17; *sed quære* now since the 1 W. 4, c. 70, *ante*, 56, 57.

(w) 2 Sellow, 375.

(x) *Eden v. Wills*, 2 Ld. Raym. 1417, 2 Stra. 694, S. C.

(y) See a form, Chit. Forms, 230.

(z) *Millar v. Yerraway*, 3 Bur. 1723; *Gross v. Nash*, 4 Id. 2430.

(a) *Sharp v. Clark*, 13 East, 391.

(b) See the form, Chit. Forms, 240.

(c) *Wright v. Peckham*, 15 East, 204.

(d) R. H. 2 W. 4, r. 81; and see *post*, Vol. 2, Book 3, Part 1, Chap 3.

(e) 2 Bac. Abr. Error, (K), 1; *Sambridge v. Housley*, 2 T. R. 17.

(f) See *Johann v. Jebb*, 3 Bur. 1772;

and see the form, Chit. Forms.

(g) *James v. Staples*, 6 T. R. 367; and see *Marshal v. Cope*, 2 Str. 917; but see *Sambridge v. Housley*, 2 T. R. 17.

error do not assign errors within that time, you may sign judgment of nonpros and tax your costs (h). Even where judgment of nonpros was signed before the expiration of the rule to assign errors, and execution sued out thereon, yet as the plaintiff had not actually assigned his errors before the rule expired, the Court refused to set aside the execution and judgment (i).

Where the plaintiff below brings error to reverse his own judgment, a *sci. fa. quare executionem non* is never sued out; but the Court will make a rule that he assign errors within a limited time, otherwise that the writ of error shall be nonprosced (j).

*Assignment of errors.*] Engross the assignment of errors on plain paper; get it signed by counsel; (see ante, p. 348); and deliver it to the defendant's attorney (k). This must be done in term, and not in vacation (l).

The plaintiff in error is not allowed to allege diminution (m), unless in error upon a judgment in the counties palatine (n). In error from the latter Courts the plaintiff may, where the action has been by original writ, assign the want of that writ; he may also assign the want of warrants of attorney (o). If the want of an original writ be assigned (which, however, since the 2 W. 4, c. 39, can no longer be the case in personal actions), the plaintiff must sue out a *certiorari*.

If the defendant wish to expedite the cause, let him get a rule to return the *certiorari* from the Master, on the draft *scire facias*; enter it with the clerk of the rules; and serve a copy of it on the plaintiff's attorney, as directed ante, p. 350 (p); and if the *certiorari* be not sued out and returned before the expiration of this rule, the defendant may enter a non misit breve upon record, and proceed to affirm the judgment.

See ante, p. 347, 348, &c., for other matters relating to the assignment of errors.

*Scire facias ad audiendum errores.*] In order to oblige the defendant to join in error or plead, &c., the plaintiff must sue out a *scire facias ad audiendum errores*, and have the defendant thereupon summoned, &c. as is above directed with respect to the *sci. fa. quare executionem non* (q). This writ cannot be sued out until after the *certiorari* (when necessary), has been returned (r); but it must be sued out either in the same term, or in the term next after the record is removed, otherwise the whole matter will be discontinued (s), unless the defendant within that time come in and plead gratis (t). If the

(h) See 7 East, 111. And as to the manner of signing judgment, see Vol. 2, Book 4, Part 1, Chap. 18; and see the form of the entry, Chit. Forms, 240.

(i) *Wright v. Peckham*, 15 East, 204.

(j) *Johnson v. Jebb*, 3 Bur. 1772.

(k) See the form, Chit. Forms, 240.

(l) Pr. Reg. 203.

(m) 1 Sid. 40, 147, 364; 1 Salk. 266.

(n) 1 Sid. 147, 364; 2 Bac. Abr. Error, (E). See 1 Leon. 189, 302; Yelv.

158; 1 Ro. Rep. 338; 1 Salk. 269.

(o) As to the forms, see Chit. Forms, 242.

(p) See the form, Chit. Forms.

(q) F. N. B. 20; 2 Bac. Abr. Error,

(F). See the form of the writ, Chit. Forms, 243.

(r) *Davenant v. Rastor*, 2 Ld. Raym. 1047.

(s) F. N. B. 20, (G).

(t) 1 Sid. 173.

defendant do not appear and plead to the assignment of errors, then upon producing the record of the *scire facias*, with the return, and an entry of the defendant's default, the Court upon motion will reverse the judgment (*u*).

This writ, however, is seldom used, for two reasons: first, because the defendant in error usually appears and pleads voluntarily, without being compelled to do so; and secondly, because he may be compelled, (if necessary), to appear and plead, by a rule for that purpose which may be obtained from the master, entered with the clerk of the rules, and a copy of it served upon the defendant's attorney (*w*).

*Plea, &c.*] The plea or joinder in error is made out on plain paper, signed by counsel, (*see ante*, 351, 352), and delivered to the plaintiff's attorney (*x*).

*Entry of the proceedings upon record.*] After issue is joined, the plaintiff in error (or, in default of his doing so, the defendant) must enter the proceedings upon a new roll, intitled of the term the transcript is brought in, (or, it seems, of the term in which issue is joined, and which may save a *post terminum* roll), thus: "*As yet of term, in the third year of the reign of King William the Fourth. Witness, Sir Thomas Denman, Knight.*" Then enter the warrants of attorney, the writ of error, and the return; the proceedings in the inferior court, to the end of the final judgment; then the assignment of errors, joinder, &c.; and lastly, a *curia advisari vult* (*y*).

*Take the roll to the clerk of the judgments, and he will enter the pleadings; pay for the entry.*

*Argument.*] Either party may move for a *concilium*. For this purpose, *make out a motion paper, and get it signed by counsel; take it to the office of the clerk of the rules, and draw up the rule; pay him 4s. and serve a copy of it on the opposite attorney. Then enter the cause for argument with the clerk of the papers.*

Copies of the proceedings must be made upon unstamped brief paper (usually termed paper-books) with the objections intended to be insisted on in argument, marked in the margin, (*R. E. 2 J. 2; R. II. 38 G. 3*), and must be delivered to the Judges, on or before Saturday, if the cause be set down to be argued on the following Tuesday, or on or before Tuesday, if the cause be set down to be argued on the following Friday: (*R. T. 40 G. 3*): the plaintiff's attorney delivers one to the Chief Justice, and one to the senior Judge; the defendant's attorney, one to each of the other Judges; and if either party neglect to deliver books, the other party may deliver all, and be allowed for them in costs. (*R. M. 17 C. 1*) (*z*). *Pay the Judge's clerks*

(*u*) See *Walmesley v. Rozen*, 2 Str. 1210; *Thatcher v. Stephenson*, 1 Id. 144.

(*w*) *Moseley v. Cocks*, Carth. 40, 41.

(*x*) See form of joinder, Chit. Forms, 243. See further, as to pleas, &c., *ante*,

350-1.

(*y*) See, as to the form, Chit. Forms, 244.

(*z*) *R. M. 17 C. 1*. See Chit. Forms, 244; and see *ante*, 352.

**2s. with each paper-book.** Each party must also furnish his counsel with a paper-book, for the purpose of arguing the cause.

When the cause is called on, the counsel for the plaintiff is heard first; then the counsel for the defendant; and, lastly, the plaintiff's counsel in reply. The Court will hear but one counsel on each side. If the case be not argued, counsel will move for judgment of affirmance or reversal.

If the Court be equally divided, no judgment can be given; unless the parties consent that it shall be affirmed, &c. in order that they may have the case determined upon a writ of error to the House of Lords (a).

*Judgment.*] Draw up your rule for judgment with the clerk of the rules; pay him 2s.; enter the judgment on the roll: take the rule and roll to the master, and he will mark the latter, and tax the costs (b).

If the former judgment be affirmed, this Court will order the master to compute interest upon it, by way of damages, and add it to the costs, in the same manner as the Court of Exchequer Chamber (c).

*Execution, &c.*] As to execution and restitution, see, generally, *ante*, 357 (d). These writs are sued out of the Court of King's Bench, notwithstanding the original record remains in the Court below (e).

### 5. Writ of Error to the House of Lords, after judgment of inferior court affirmed or reversed in King's Bench.

The practice in this case is the same as mentioned *ante*, 357 to 362; and the forms the same, *mutatis mutandis*, as those there referred to.

### 6. Writ of Error coram nobis.

1. Proceedings to the Assignment of Errors.
2. Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Law.
3. Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Fact.

#### 1. Proceedings to the Assignment of Errors.

As to the cases in which a writ of error *coram nobis* lies in the Court of King's Bench, see *ante*, 329.

*The writ.*] The writ is directed "To our Justices assigned to hold

(a) *Thornby v. Fleetwood*, 1 Str. 379, 381.

(b) See the forms, Chit. Forms, 244, 245.

(c) *Sinck v. Langton*, Doug. 752; and see *ante*, 353; and *Entwistle v. Shepherd*, 2 T. R. 78; and see, as to costs, *ante*,

356; and further, as to the judgment, *ante*, 353, 357.

(d) See the form of a *fi. fa.* after affirmance or *nonpross* in error, Chit. Forms, 241, 246; of *ca. sa.*, *Id.*

(e) *Vicars v. Haydon*, Cowp. 841; and see *Cowperthwaite v. Owen*, 3 T. R. 657.

pleas in our Court before us" (f); and is not made returnable, because it is merely in the nature of a commission to this Court to examine the record and rectify the error (g). If it be brought upon a former writ being quashed or having abated, it must recite the former writ, and correctly, otherwise it may be quashed (h).

*How sued out, &c.] Make out a præcipe for the writ (i). Take it to the cursitor, as directed ante, 336; and he will issue the writ. Take it then to the master in the Court of King's Bench, and he will allow it in open Court; pay him 2s. 6d. Draw up the rule of allowance with the clerk of the rules (k); and serve a copy of it upon the opposite attorney; (ante, 335). If the error to be assigned be an error in fact, there must be an affidavit thereof, otherwise the writ of error will not be allowed (l). As for instance, if infancy be intended to be assigned as error, a copy of the register of the baptism from the register book, and an affidavit that it is a true copy, and also stating the age of the infant, must be laid before the cursitor, before he will make out the writ. So, if coverture is to be assigned for error, a similar affidavit of the coverture must be made (m). If brought by an infant, a guardian, or *prochein ami* must be appointed to prosecute the writ of error, as in ordinary cases.*

*Bail.]* Before the 6 G. 4, c. 96 (*ante*, 342), a writ of error *coram nobis* was of itself, in some cases, a *supersedeas*, in some not; for it was not within the former statutes requiring bail in error (n). When it was brought after the abatement of a former writ, it seems that if the former writ abated by the act of God, or by act of law, the second writ was a *supersedeas*; but otherwise, if it abated by the act or default of the party. (*Ante*, 340, 341). Where it was brought after a former writ quashed for insufficiency, it was no *supersedeas* (o). Where error in fact was intended to be assigned, the writ of error was or was not a *supersedeas* according to circumstances; and therefore in such a case execution could not be sued out after the allowance of the writ of error, without the leave of the Court (p). In any of the above cases, where the writ of error operated as a *supersedeas*, no bail of course was required; but the plaintiff might at once proceed to assign errors, immediately after the writ of error was allowed. But when the writ of error did not of itself operate as a *supersedeas*, the Court, upon motion, would grant a rule, that upon the plaintiff in error putting in and perfecting bail in error within four days next ensuing, all pro-

(f) 2 Saund. 101 g; Lil. Ent. 220, 231, 232.

(g) See the form of the writ, Chit. Forms, 247.

(h) *Walker v. Stokes*, 1 Ld. Raym. 151, Carth. 369, S. C.

(i) See the form, Chit. Forms, 246.

(k) Id. 249.

(l) *Birch v. Trist*, 8 East, 415.

(m) *Imp. B. R.* 361. See *Ribout v.*

*Wheeler*, Say. 166. See the form of the affidavit, Chit. Forms, 248.

(n) 1 Lil. Pr. Reg. 710.

(o) *Walker v. Stokes*, 1 Ld. Raym. 151, Carth. 369, S. C.; see *Cooper v. Ginger*, 1 Str. 607, 2 Ld. Raym. 1403, S. C.

(p) *Birch v. Trist*, 8 East. 412; Say. 166.

ceedings on the original judgment should be stayed until the writ of error shall be determined. This formed a part of the rule of allowance. But it should seem that the 6 G. 4, c. 96, s. 1 (*ante*, 342), is applicable to writs of error *coram nobis*, and that, therefore, to render the latter a *supersedeas*, bail is, in all cases, requisite.

The bail is put in and justified as directed *ante*, 343 to 346 (q).

## 2. Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Law.

*Assignment of errors.*] After bail is completed, or when bail is not required after the copy of the allowance of the writ of error has been served, *the master will give you a rule upon the plaintiff to assign errors (r). Enter it with the clerk of the rules; pay him 6d.; and serve a copy of it on the plaintiff's attorney (s).* This is a four-day rule; and if the plaintiff do not assign errors before the expiration of it, you may sign judgment of *nonpros*, and tax your costs (t).

*The assignment of errors must be engrossed on plain paper, and signed by counsel. (See ante, 348). Deliver it to the defendant's attorney (u).* The *certiorari* is tested in the name of the Chief Justice of the King's Bench, and returnable *immediate*. *Get it signed by the signer of the writs, and sealed; pay 1s. 8d. signing; sealing 7d. Then leave it with the officer or other person to whom it is directed, and get it returned.*

If the defendant wish to expedite the cause, *he should get a rule from the master to return the certiorari; enter it with the clerk of the rules; pay him 6d.; and serve a copy on the plaintiff's attorney.* This is a four-day rule; and if, upon its expiration, the *certiorari* be not returned, the defendant may enter a *non misit breve* on record, plead *in nullo est erratum*, and proceed to affirm the judgment (x).

*Plea, &c.*] As soon as errors are assigned, and the *certiorari* (when necessary) returned, the defendant must plead to the assignment. This he generally does voluntarily; but if he neglect to do so, you may compel him by a rule obtained for that purpose from the master, and entered with the clerk of the rules, a copy of which must be served on the defendant's attorney. This is a four-day rule; and if the defendant do not join in error before it expires, the Court, upon motion, will reverse the judgment (y).

The plea, replication, &c. is engrossed on plain paper, signed by counsel, (*see ante*, 351, 352), and delivered to the opposite attorney (z).

(q) See as to the forms, Chit. Forms, 250.

(r) See the form, Chit. Forms, 250.

(s) Id.

(t) See *Salt v. Richards*, 7 East, 111; and see Chit. Forms, 250.

(u) See as to the form, Chit. Forms, 251; and see generally upon this subject, *ante*, 348, 349.

(x) See *Smith v. Stoneard*, 2 Ld. Raym., 1156, 1 Salk. 267, S. C.; Comyns, 118; and *ante*, 350, 355.

(y) See *Walmsley v. Hoscar*, 2 Str. 1210, *Thatcher v. Stephenson*, 1 Str. 144.

(z) See as to the form of the joinder, Chit. Forms, 351; and see *ante*, 350, &c.



*Entry of the proceedings on record.*] When issue is joined, the proceedings must be entered on record. If it be a writ of error on a judgment in this Court, the proceedings must be entered on the judgment roll (a); if on the judgment of another Court, after a former writ of error abated, &c. then it must be entered on the same roll with such former writ of error, otherwise the whole will be discontinued (b).

*Argument.*] Take the roll to the clerk of the papers, who will mark it as read; then take it and the motion paper for the concilium to the clerk of the rules, and draw up the rule, as directed ante, 366. And lastly, enter the rule with the clerk of the papers, and serve a copy of it on the opposite attorney (c). Deliver paper books to the Judges, and let the cause be argued, as directed, ante, 366 (d).

*Judgment. &c.*] Draw up the rule for judgment with the clerk of the rules; pay him 2s. (e). Then enter the judgment on the roll (f); Take the rule and roll to the master, and he will mark the latter and tax costs. As to interest on the judgment, see ante, 353, and as to costs, see ante, 356; and further as to the judgment, see ante, 367, 353, 357. Docket and carry in the roll, see ante, 366.

As to execution and restitution, see ante, 353, 367. These writs of course issue out of this Court (c).

### 3. Proceedings from the Assignment of Errors to Execution, where the Errors are Matter of Fact.

*Assignment of errors.*] The plaintiff may assign for error any matter of fact, which, if it appeared upon the record, would have proved it to be erroneous: thus, that a sole defendant, or one of several defendants, under age, appeared by attorney (g), except in ejectment (h). Or that a plaintiff (i), or defendant (k), or one of several defendants (l), was a *feme covert* at the time of the commencement of the action (m); or that the plaintiff or defendant died before verdict or interlocutory judgment (n); but assigning for error the death of plaintiff in ejectment, would be a contempt (o). It must be observed that the plaintiff cannot assign more than one error in fact, although

(a) 2 Saund. 101 f.

(b) *Walker v. Stokoe*, 1 Ld. Raym. 151, Carth. 369, S. C.; Cro. El. 281; and see Id. 155. See the form of the entry, Chit. Forms, 251.

(c) See the form, Chit. Forms, 251.

(d) Id.

(e) See the forms, Chit. Forms, 251.

(f) Id.

(g) *Ann. Style*, 406, *Danvers' Abr.* 2 Vol. Error, 12, pl. 13; and see 21 J. 1, c. 13, s. 2; but see *Bird v. Pegg*, 5 B. & Ald. 418.

(h) *Goodright v. Wright*, 1 Str. 33. See

the form of the assignment, Tld. Forms, 525, s. 30.

(i) Ro. Abr. 761.

(k) Id. 748, 750; *Style*, 254, 280. 2 Ro. Rep. 53.

(l) Ro. Abr. 747.

(m) See the form of such an assignment, Chit. Forms, 252.

(n) 2 Saund. 101, 101 k. See the form of such an assignment, 10 Went. 4.

(o) *Moore v. Goodright*, 2 Str. 699. See further as to the assignment of errors, ante, 348.

of errors in law he may assign as many as he pleases (*p*); nor can he assign error in fact and error in law together, for they are distinct things and require different trials (*q*).

The assignment concludes with a verification (*r*), and prayer that the former judgment may be revoked, annulled, and altogether held for nothing, and that the plaintiff may be restored to all things which he has lost by occasion of the said judgment (*s*). Where the death of the plaintiff in the original suit, before verdict or interlocutory judgment, is assigned for error, there is also added to the assignment a prayer for a *scire facias ad audiendum errores* against his executor or administrator (*t*).

The assignment must be signed by counsel, ante, 348; engross it on plain paper, and deliver it to the defendant's attorney (*u*). If it be necessary to compel the plaintiff to assign errors, you may rule him to do so, as directed, ante, 347.

*Plea, &c.*] The defendant may come in voluntarily, and plead to the assignment; or the plaintiff may compel him to plead, by a rule to be obtained from the master for that purpose, which must be entered with the clerk of the rules, and a copy served on the defendant's attorney. This is a four-day rule; and if the defendant do not plead before the expiration of that time from the service, the Court upon motion will reverse the judgment (*v*).

The defendant may either plead specially, confessing and avoiding the fact assigned, and concluding with a verification; or may plead generally, denying the fact assigned, and concluding to the country; or he may plead *in nullo est erratum*, which confesses the fact assigned, but denies that it is error; or he may demur. (See ante, 350, 351).

If the error be well assigned, and the defendant wish to put in issue the truth of the fact, he should deny it by his plea, and so join issue upon it; but he must not in such a case plead *in nullo est erratum*, for by doing so he would acknowledge the fact assigned to be true (*x*). But if the defendant would acknowledge the fact, but deny it to be error, he should plead *in nullo est erratum* (*y*). So, if an error be assigned which is not assignable (*z*), or be ill assigned (*a*), the defendant may plead *in nullo est erratum*, without danger of confessing the fact assigned; for the common joinder in such a case is

(*p*) F. N. B. 45 E.; ante, 348.

(*q*) Ro. Abr. 716; *Hoddy v. Hodges*, 1 Sid. 147, 1 Leon. 105; *Burdett v. Wheatly*, 2 Ld. Raym. 883; *Jeffrey v. Wood*, 1 Str. 439, 2 Saund. 101 *q*; ante, 348.

(*r*) *Sheepshanks v. Lucas*, 1 Bur. 412, Carth. 367, 2 Bac. Abr. Error. (K. 2).

(*s*) See the forms referred to in the notes ante, p. 370.

(*t*) See *Edmonds v. Probert*, Carth. 339; *Dove v. Durkin*, T. Raym. 59, 1 Sid. 93, S. C.

(*u*) See Chit. Forms, 252.

(*v*) See *Walmsley v. Rooson*, 2 Str.

1210; *Thatcher v. Stephenson*, 1 Str. 144; ante, 347.

(*z*) Ro. Abr. 768, Bro. Error, 93; *Sheepshanks v. Lucas*, 1 Bur. 410, 1 Sid. 93; *Dove v. Durkin*, T. Raym. 59; *Okeover v. Overbury*, Id. 231; *Grell v. Richards*, 1 Lev. 294; ante, 349.

(*y*) Ro. Abr. 763.

(*z*) Cro. Car. 52; *Yelv. 58*; T. Raym. 231; 1 Vent. 252; 1 Lev. 76.

(*a*) Cro. Jac. 29, 521; *Okeover v. Overbury*, T. Raym. 231, Cro. Car. 421, Ro. Abr. 758; *Evans v. Roberts*, 3 Salk. 147.

deemed a demurrer, and the issue thereupon will afterwards be tried as in other cases of demurrer (b). But if the plaintiff assign error in fact, and error in law, (which we have seen, *ante*, 348, 370, would be bad), the defendant should demur specially to the assignment for the duplicity; for if, instead of doing so, he plead *in nullo est erratum*, it will be an acknowledgment of the error in fact, and the Court must thereupon reverse the judgment (c).

*The plea, replication, &c. or demurrer must be signed by counsel, (see ante, 351, 352), engrossed on plain paper, and delivered to the attorney of the opposite party.*

As soon as issue is joined, either attorney may make up the issue upon plain paper, as in ordinary cases, and deliver it to the other. The issue contains, first, a copy of the judgment roll, (which should previously have been carried in); then an entry of the allowance of the writ of error; the plea, replication, &c.; and, lastly, the award of the *venire*, if it be an issue of fact (d).

*Entry of the proceedings upon record.*] The proceedings are entered of record, on the same roll as the original judgment; beginning by an entry of the allowance of the writ of error, and the writ &c. as in the issue (e). This is done for you by the clerk of the treasury.

*Record of Nisi Prius.*] The record of *Nisi Prius* must next be made up, sealed and passed; which may be done either by the plaintiff or defendant. This record is nearly in the usual form; beginning with the first *placita*, as *ante*, 255; then entering the writ of error, assignment, &c. to the award of the *venire*, inclusive, as in the issue; next the second *placita*, as *ante*, 255; and lastly, the *jurata*, as *ante*, 255 (f).

*Trial, &c.*] After having the record sealed and passed, and notice of trial given, as in ordinary cases, *set down the cause for trial with the clerk at the Chief Justice's Chambers*. The trial, &c., is the same in every respect as other trials at *Nisi Prius*.

After verdict, the party succeeding must move to put the cause in the paper for argument (g); and afterwards, upon producing the *postea*, the Court will give judgment of affirmance for the defendant, or that "the judgment aforesaid be recalled," if for the plaintiff (h),

(b) See 2 Bac. Abr. Error, (G). (K). 2.

(c) Carth. 338, 339, 2 Bac. Abr. Error, (K), 2; *Kenna v. Roberts*, 3 Salk. 147. See the form of a plea to an assignment of coverture of defendant, that the defendant was not nor is coverte, Chit. Forms, 253. See also the form of a demurrer, 10 Went. 5.

(d) See Chit. Forms, 253.

(e) See as to the form, Chit. Forms, 253.

(f) Id. 254.

(g) See 1 Str. 127. and see as to the form of the rule for *concilium*, Chit. Forms, 251.

(h) Ro. Abr. 805, pl. 9.

according to the finding (i). *Get the postea and judgment entered on the roll, by the clerk of the treasury, and sue out execution, after having obtained the leave of the Court for that purpose (k).*

SECT. 4.

Execution.

1. *Execution, generally*, 373 to 389.
2. *Fieri facias*, 389 to 402.
3. *Elegit*, 402 to 407.
4. *Levari facias*, 408.
5. *Capias ad satisfaciendum*, 408 to 414.
6. *Execution for defendant*, 414.

1. *Execution, generally.*

*When to be sued out.*] We have seen, *ante*, 320 a, that, as soon as the final judgment is actually signed by the master, but not before, the party in whose favour it is given may immediately sue out execution, and this before the judgment is entered on the roll, or docketed (l).

The Judge who tried the cause may, as we have seen, *ante*, 286, 318, in case of a nonsuit or verdict, *certify* on the back of the record (at any time before the end of the sittings or assizes), that, in his opinion, execution ought to issue *forthwith*, or on such a day as he shall certify, and subject or not to any qualification or condition, and for a part or the whole of the sum found for the plaintiff; in which cases costs may be taxed, and judgment signed forthwith, and execution forthwith issued, or afterwards on any day in vacation or term (m).

By 3 & 4 W. 4, c. 42, s. 18, (*post*, 525), at the return of any writ of inquiry, under 8 & 9 W. 3, c. 11, executed before the sheriff, according to the former act, and also at the return of any writ for the trial of an issue before the sheriff, (*see ante*, 287 c), costs may be taxed, judgment signed, and execution issued *forthwith*, unless the sheriff, deputy, or Judge before whom the trial may be had, certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity of applying to the Court or a Judge for a new inquiry or trial, or a Judge shall order that judgment or execution shall be stayed till a day to be named in such order.

In other writs of inquiry, also, at the expiration of four days from the return of the writ final judgment may be signed, and execution issued, unless the sheriff, or other officer before whom the writ of inquiry may be executed, shall certify on such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court to set aside the execution of such writ, or a Judge

(i) 2 Sellen, 422.

(k) *Post*, 375.

(l) *Bragner v. Langmead*, 7 T. R. 21.  
n.: and see *Stanpe v. Kinsey*, 2 Show.

494.

(m) 1 W. 4, c. 7, s. 2. *ante*, 318; and  
*see form of a fi. fa.*, Chit. Forms, 254;  
and of a *ca. sa.*, *Id.*

shall order the judgment to be stayed until a day named in such order. (1 W. 4, c. 7, s. 1, and R. H. 2 W. 3, r. 67, *ante*, 316).

In *ejectments*, by the 1 W. 4, c. 70, s. 38, a Judge may allow execution to be issued *immediately* after a verdict for plaintiff, or after a nonsuit, for not confessing lease, entry, and *oust*.

The 1 & 2 W. 4, c. 58, s. 7, (relating to the relief of sheriffs or other persons against *adverse claims*, where they have no interest therein,) provides, that, if the *costs* directed to be paid under a rule or decision made under that act and entered of record, be not paid in fifteen days after notice of the taxation and amount thereof given to the party ordered to pay them, execution may issue for them, with the other costs of the writ of execution, &c. (*See post*, Vol. 2, 756).

Execution cannot be sued out if the party has agreed not to issue it, or where he is restrained by injunction (*n*), or if a writ of error be depending (*o*). A writ of error, in general, operates as a *supersedeas* of execution from the time of its allowance, provided substantial bail be put in and perfected in due time. (*See ante*, 336, &c.)

A writ of execution may be sued out at any time within a year and a day after the judgment is signed (*p*), in cases where a *scire facias* is not required, or where execution is not stayed by writ of error, injunction, agreement, or the like (*q*). If, however, a writ of execution be actually sued out, and returned and filed within the year (*r*), and it be not executed so as to give the party the full benefit of his judgment, other writs of execution may be sued out after the year, upon continuing the first writ down to them (*s*); and it is not necessary, in such a case, that these writs should be of the same species; for a *ca. sa.*, for instance, may issue after the year, upon a *fi. fa.* regularly sued out before that time, and returned and filed (*s*). So, if a party die within the year and day after judgment obtained against him, a *fi. fa.* tested before the death (*t*) may be sued out against his goods in the hands of his executor or administrator (*u*). Or, even if he died before judgment, but after the day in bank, judgment may be signed as of the term in which he died; or, if he died in vacation, then of the preceding term; and a *fi. fa.* tested the first day of such term may be sued out, and executed upon his goods in the hands of his executor, &c. (*x*). And, in a late case, where a

(n) *Winter v. Lightbound*, 1 Stra. 301, 2 Burr. 600, S. C.

(o) *See Feal v. Warner*, 1 Mod. 20; *Winter v. Lightbound*, 1 Str. 301; *Francis v. Nash*, C. T. Hardw. 53.

(p) Stat. Westm. 2, (13 Ed. 1), c. 45; *Simpson v. Gray*, Barnes, 197; *Winter v. Lightbound*, 1 Str. 301.

(q) As to the cases where a judgment must be revived by *scire facias*, before execution can be sued out upon it, see Vol. 2, Book 3, Part 1, Chap. 3.

(r) The cases in 2 Wils. 82, Barnes, 215, 2 Saund. 88, n., do not clearly shew when the first *fi. fa.* must be returned and filed; and the books of practice

and authorities do not appear very clear upon the point. It should seem, however, that the first *fi. fa.* or *ca. sa.* ought to be issued, returned, and filed *within the year*, and, at all events, before the second writ is issued. MS. M. T. 1831.

(s) Co. Lit. 290. b.; *Aires v. Hardress*, 1 Str. 100; and see *post*, Vol. 2, 600; R. E. 5 G. 2.

(t) *Happy v. Parris*, 6 T. R. 368; *Waghorne v. Langmead*, 1 B. & P. 571.

(u) *Odes v. Woodward*, 2 Raym. 849.

(x) *Bragner v. Langmead*, 7 T. R. 20. See *Copley v. Day*, 4 Taunt. 782; *Bates v. Lockwood*, 1 T. R. 637.

*cognovit* was given on the 8th of February, in Hilary term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing 1st of April, and the defendant died in Hilary vacation, before the 1st of April, judgment entered up on the 10th of April, in Hilary vacation, after the defendant's death, was held regular, as relating to the first day of Hilary term; as was also the execution thereon tested of a day in that term, anterior to the defendant's death (y). Care must be taken, however, not to sue out the writ before the judgment is actually signed. (*Ante*, 373).

In actions upon policies of insurance, where several defendants enter into the common consolidation rule, the plaintiff, upon obtaining a verdict and judgment, cannot sue out execution against those who entered into the rule, without first obtaining *leave of the Court* for that purpose (z). Such leave, it seems, is also necessary before execution is sued out after the allowance of a writ of error *coram nobis* (a). But it is not necessary before suing out execution on a judgment entered up on an award made after a verdict for a certain sum, subject to such award (b).

Where, in actions upon a promissory note against the drawer and indorser, the principal in one, and the costs in both actions, were tendered to the plaintiff after judgment, the Court, upon application, ruled that no execution should be sued out (c). They have refused to stay execution against a defendant until after the trial of an indictment against the plaintiff's witnesses for perjury (d).

*What writs, form of, and against whom to be issued, and for what sum.*] The party, for whom the judgment was given, may have a writ of *feri facias*, or *elegit*, or *levari facias*, or *capias ad satisfaciendum*, at his option; or he may have them all in succession, until his judgment be satisfied; or, after suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, either of the same species (e), or of a different species, such as a *fl. fa.* and *ca. sa.*, or the like (f). In a case where the plaintiff obtained judgment against two defendants, and sued out two several writs of *testatum fieri facias*, at the same time into different counties, and the sheriff under each of them took possession of the goods of one of the defendants; it appearing that the plaintiff's object was merely to obtain payment of his debt, and that he was willing to allow the defendants the full benefit of all monies levied under the writ in one county, before he would call on the sheriff to return the writ issued into the other; the Court of Exchequer refused to put the plaintiff to his election, which of the writs he would proceed under, and also refused to set

(y) *Calvert v. Tomlin*, 5 Bingh. 1. 2 M. & P. 1, S. C.

(z) *Tidd*, 998.

(a) *Ribout v. Wheeler*, Say, 166; *Rafael v. Vereat*, 2 W. Bl. 1067; *Hayes v. Thornton*, Barnes, 201.

(b) *Lee v. Lingard*, 1 East, 401; *Higginson v. Nesbitt*, 1 B. & P. 97; *Id.* 480.

(c) *Windham v. Wither*, 1 Str. 515.

(d) *Warwick v. Bruce*, 4 M. & Sel. 144.

(e) *Tidd*, 995.

(f) *Primrose v. Gibson*, 2 D. & R. 193. See *Müller v. Parnell*, 6 Taunt. 370, 2 Marsh. 78, S. C.

aside the other for irregularity (*z*). If part of the amount only be levied on a *feri facias*, or if part be levied on the goods under an *elegit*, and *nihil* be returned as to the lands, a new writ of execution may be issued for the remainder. But if any part, however trifling, has been levied, the plaintiff cannot sue out any other writ of execution until *after the return* of the first writ (*h*); and this though the sheriff may have withdrawn the execution (*i*). And in a recent case, where a defendant was taken under a *ca. sa.*, before the return of a *fi. fa.* under which the plaintiff had seized, though the whole amount of the levy was swallowed up by the landlord's claim for rent, except 17s. 6d. which went towards the expenses of the execution, the Court discharged the defendant out of custody (*k*). Where, however, the sheriff seized goods under a *fi. fa.*, but the *whole* of them were then already seized under a distress for rent, and he afterwards withdrew the execution, it was considered a *ca. sa.* might be issued and executed before the return of the *fi. fa.* (*l*). And though part of the amount of the judgment be levied under a *fi. fa.*, the plaintiff may bring an *action* for the residue before the return of such *fi. fa.*, and arrest the defendant thereon as in other cases in an action on a judgment, and as to which see *ante*, 80 (*m*). If the party be taken under a *ca. sa.* no other writ can be executed against him, unless he die in execution, or escape, or be rescued. (*Post*, 414). And so, if lands be extended on an *elegit*, and delivered to the plaintiff, a *fi. fa.* or *ca. sa.* cannot afterwards be executed against him (*n*). These points, however, will be found more fully noticed when hereafter treating of the particular writs themselves. If judgment be obtained against a defendant in custody on mesne process, and he has not been charged in execution, the plaintiff may have execution against his goods without first discharging him; though, indeed, he must be always ready to give such discharge when required (*o*).

Care must be taken that the writ of execution strictly pursue the judgment, and be warranted by it; otherwise it will be void. Thus, upon a judgment against two, you cannot sue out a separate *capias* against one (*p*); nor a *capias* against one, and an *elegit* against another (*q*). But where an action was brought against five defendants, and there was a verdict against four, and judgment by default against the fifth, and error was brought in the name of the fifth only, the Court, upon motion, gave leave to take out execution against the other four (*r*). Or, if a *scire facias* be sued out to revive a judgment against two, and one be returned summoned and make default, and the other

(*z*) *Cooper v. Rowe*, Tidd, 9th ed. 195; *Edmond, Assignee of Sheriff of Surry, v. Ross*, 9 Price, 5; 1 Ken. 120.

(*h*) *Coppendale v. Debonnaire*, Barnes, 213; *Wilson v. Kingston*, 2 Chit. Rep. 203; *Foster v. Jackson*, Hob. 58; *Laices v. Codrington*, 1 Dowl. P. C. 30.

(*i*) *Miller v. Parnell*, 2 Marsh. 78, 6 Taunt. 370, S. C.

(*k*) *Hopkinson v. Walley*, 2 C. & J. 86, 1 Dowl. P. C. 208, S. C.

(*l*) See *Edmond, Assignee of Sheriff of Surry, v. Ross*, 9 Price, 5, 12.

(*m*) *Green v. Elgie*, 1 Dowl. P. C. 344, 3 B. & Adol. 437, S. C.

(*n*) *Crawley v. Lidgate*, Cro. Jac. 330; *Beacon v. Peck*, 1 Stra. 226, 2 Ld. Raym. 1451, S. C.; *post*, 406.

(*o*) *Jones v. Tye*, 1 Dowl. P. C. 181.

(*p*) 15 H. 7; Ro. Abr. 888; *Clarke v. Clement*, 6 T. R. 525.

(*q*) Ro. Abr. 880; and see *Blumfield v. Roserwith*, Cro. El. 573, 574; 5 Co. 86, 87; 2 Bac. Abr. Execution, (G).

(*r*) *Mason v. Simmonds*, Barnes, 202.

be returned *nihil*, the plaintiff may have execution against him who made default for the whole; or, if it were returned that one of them was dead, the plaintiff might have execution for the whole against the other (s). So, where there are several plaintiffs or defendants, and one of them dies, execution may be sued out by or against the survivors, upon suggesting the death upon the roll (t). If a *scire facias* be issued out unnecessarily, the execution must still issue on it (u). A special execution is not warranted by a general judgment; therefore, a general judgment against an insolvent debtor was held not to warrant a special execution against his future effects; and was deemed void (v). But the Court, in these cases, unless the rights of third parties were affected by the amendment, will allow the writ to be amended, so as to make it conformable with the judgment (x).

In assumpsit, covenant, case, trespass, and replevin, the writ of execution for the plaintiff is for damages and costs. In debt, the writ is for the debt, damages, and costs. But in debt on bond for performance of covenants, &c. where breaches are suggested, &c. under the stat. 8 & 9 W. 3, c. 11, s. 8, (*post*, Vol. 2, 522), although the writ of execution must be for the entire penalty, damages, and costs, yet it should be indorsed to levy only the damages assessed upon the breaches, the costs found by the jury, the costs of increase, and the costs of the execution; but if the damages assessed and charges of execution exceed the penalty of the bond, the execution can be only for the amount of the penalty, and the costs of increase (y). The writ and return in this case must be entered on the roll (z). So, in debt on bond conditioned to pay a sum in gross, although execution must be sued out for the entire penalty, in order to make it conformable with the judgment, yet it should be indorsed to levy only the principal, interest, nominal damages, and costs; and if it be executed for more, or if the defendant be charged in execution for more, it may be reduced, upon application to the Court, or to a Judge at chambers (a); and where judgment was entered up for the penalty of a bond given to secure an annuity, and the defendant was taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorized the taking out execution for the arrears, the writ set aside the execution *in toto*, and not merely charged the defendant *pro tanto* (b). In detinue, the execution for plaintiff is for the goods or their value, with damages and costs.

For the defendant, in all cases excepting replevin, the execution is for the costs only; and in replevin, on a judgment at common law, it is also for a return of the goods; or on a judgment upon stat. 17 C. 2, c. 7, for the arrears of rent and costs. See further, as to replevin, *post*, Vol. 2, 594.

In an action against the clerk to trustees of a turnpike road, under a statute which permits the trustees to be sued in the name of their clerk, execution cannot in general issue against the clerk personally (c).

(s) 1 E. 3, 13; 1 Ro. Abr. 600.

(t) *Withers v. Harris*, 2 Ld. Raym. 808; and see *Pennor v. Brace*, 1 Saik. 319; *Howard v. Pitt*, 1 Show. 494; and *post*, Vol. 2, 604.

(u) *Davis v. Norton*, 1 Bingh. 133.

(v) *Buxton v. Mardin*, 1 T. R. 82.

(x) *Shaw v. Marwell*, 6 T. R. 450. See *Phillips v. Tanner*, 6 Bing. 237.

(y) 1 Saund. 586.

(z) See form of entry, Chit. Forms, 432.

(a) See *Amery v. Smalridge*, 2 W. Bl. 701.

(b) *Tilly v. Best*, 16 East, 163. See further, *post*, 592.

(c) *Wormwell v. Hailstone*, 6 Bingh. 608.



In the case of several actions brought against different parties, for the same debt, as on a bail bond, or bill of exchange, &c., each party is liable to pay the whole debt, but the costs of the action against himself only; and the levy must be made accordingly.

[*Direction, teste, and return of the writ.*] The *fieri facias* and *ca. sa.* should regularly in the first instance issue and be directed to the sheriff of the county in which the venue in the action was laid; and after being returned by that sheriff, a *testatum* writ may then be sued out, directed to the sheriff of another county. (*Vide post*, 389). But an *elegit*, *levari facias*, or extort, may, it seems, be directed to the sheriff of a different county, in the first instance. Upon judgments in the Courts at Westminster, execution may issue into the counties palatine (*d*); and it is the daily practice (*e*). So, upon judgments given in the counties palatine, any Court of record at Westminster may issue execution into other counties in England. (33 G. 3, c. 68, s. 1; 1 W. 4, c. 70). If the venue in the action was in a county palatine or cinque port town, the writ should be directed, as mentioned *ante*, 98, 99.

As these are judicial writs, it was, before the 3 & 4 W. 4, c. 67, s. 2, requisite that they should in all cases (except when issued by virtue of the 1 W. 4, c. 7, *ante*, 318, or the 1 & 2 W. 4, c. 58, s. 7, *ante*, 374), bear *teste* in term time (*f*); otherwise, (although it had been holden that the sheriff might justify under them (*f*),) they were so far void, that the sheriff was not liable for an escape, for instance, if an arrest had been made upon a *ca. sa.* tested out of term (*f*). But the writ might bear *teste* upon any day in the term of which judgment is signed, and even before the actual signing of the judgment (*h*); and in practice it was usual, when the writ was sued out in term, to *teste* it on the first day of the term; if sued out in vacation, to *teste* it on the last day of the preceding term; whether it was the term of which judgment was signed, or any subsequent term. It should not, however, in general, be tested of a term prior to that of which the judgment is signed (*i*). If the writ of execution was issued by virtue of the 1 W. 4, c. 7, in cases where the Judge certified it might issue, then, by the 3rd section of that act, it ought to be tested on the day of issuing it: and it might be so tested when issued, in pursuance of the 1 & 2 W. 4, c. 58. And now, by the 3 & 4 W. 4, c. 67, s. 2, all writs of execution may be tested on the day on which the same are issued, and this whether in term or vacation. A mistake in the teste may, in general, be amended (*k*).

Also, before the 3 & 4 W. 4, c. 67, s. 2, writs of execution must have been made returnable on a day certain in term, otherwise the Court would have quashed them (*l*), or, in the case of *ca. sa.*, discharged the defendant (*m*): although they would in general allow defects in this respect to be amended (*n*).

(d) *Anon.* 1 Lev. 266; *Draper v. Blaney*, Id. 291; T. Raym. 206; 2 Saund. 183; and see 1 W. 4, c. 70.

(e) 2 Saund. 194, (n).

(f) *Shirley v. Wright*, 2 Salk. 700, 2 Ld. Raym. 775, S. C.; 2 Bac. Abr. Execution, (C) 1.

(A) *Comyns*, 117.

(i) See *Gooder v. Jolley*, 1 H. Bl. 74.

(k) *Campbell v. Cumming*, 2 Bur. 1168; *Engleheart v. Dunbar*, 1 Dowl. P. C. 202.

(l) *Furtado v. Miller*, Barnes, 213. *Adams v. Sperry*, 1 Wils. 155.

(m) *Walker v. Hargyes*, Barnes, 413.

(n) *Campbell v. Cumming*, 2 Bur. 1168; *Thorpe v. Hook*, 1 Dowl. P. C. 501.

Now, however, by that act all writs of execution *may* be made *returnable immediately after execution thereof*. It should seem that you might, in the writ of execution, either adopt the words of the act, by making the writ returnable "immediately after the execution thereof," or upon any particular day, whether in term or vacation; at least in those cases where you really intend the writ to be executed.

At common law, in actions by original, it was necessary that there should be fifteen days between the *teste* and return of all writs of execution; but this was rendered unnecessary in the writs of *feri facias* and *ca. sa.* by stat. 13 C. 2, st. 2, c. 2, s. 6, unless the *ca. sa.* were sued out for the purpose of fixing the bail, or proceeding to outlawry. Since the 2 W. 4, c. 39, it should seem that there is no occasion in any case, except in proceeding to outlawry, that there should be fifteen days between the *teste* and return of any writ of execution. It was not, nor is it now, necessary in any case that a writ of execution should be made returnable in the term next after that in which it was tested; if a term intervened it is not material (o).

*Amendment of writ.*] A writ of execution may in most cases be amended for any formal error therein, unless the rights of third persons would be affected thereby. See *post*, 1 D. 2, 850.

*From what time it binds defendant's property, and priority of writs.*] The judgment, and not the writ of execution, binds the *lands* of the party; but as to his goods and chattels, they were bound by the writ of execution, at common law, from the time of its *teste*. By stat. 29 C. 2, c. 3, s. 16, however, no writ of execution against the goods of a party shall bind the property thereof, but from the time such writ shall be *delivered to the sheriff to be executed*; and for the better manifestation of such time, the sheriff or his deputy shall, upon receipt of such writ, indorse upon the back thereof the day of the month and year whereon he received it. This statute, however, was intended only to protect *purchasers* from any injury which might arise to them from the relation which writs of execution had to their *teste* at common law; and therefore, as far as relates to the party himself, and to all others but purchasers for a valuable consideration, writs of execution still bind the party's goods from the time of their *teste* (p). Also, it has been holden, that the sheriff cannot seize goods of the party, which have been sold by him, *bonâ fide*, for a valuable consideration, in market overt after the delivery of the writ to the sheriff, and before execution actually executed (q).

If two writs of execution against the same person be delivered to the sheriff, he must execute that first which was first delivered to him, even where both were delivered upon the same day (r); unless the first writ, or the possession held under it, were fraudulent, in which case the second should have priority (s). But if, contrary to his duty,

(o) *Shirley v. Wright*, 2 Salk. 700, 2 Ld. Raym. 775, S.C.

(p) 1 Saund. 219 f; 2 Vent. 218; Comb. 33, 145; *Houghton v. Rugby*, 2 Show. 485, Skm. 257, S.C.

(q) 2 Eq. Ca. Abr. 381.

(r) *Hutchinson v. Johnson*, 1 T. R. 739; and see *Saule v. Paynter*, 1 D. & R. 307.

(s) *Bradey v. Wyndham*, 1 Wils. 44;

he execute the second writ first, the execution and sale will be valid, and bind the sheriff; and the party who sued out the first must have recourse to his action against the sheriff, if he be thereby damnified (*t*). Where the sheriff, however, merely seizes under the second execution, and then (before any sale is actually made of the defendant's goods) seizes under the first, the first writ shall have priority, the property in the goods not being divested out of defendant until execution executed (*u*). Also, where a writ of execution was delivered to the sheriff at the suit of *A.*, and which was not executed before it was returnable, and *A.* therefore sued out an *alias*, but, before it could be delivered to the sheriff, an execution against the same party at the suit of *B.* was left at the sheriff's office; the Court held that *B.*'s writ was entitled to priority (*x*). But the goods are bound by the second writ, from the date of the delivery of it to the sheriff, subject of course to the first execution (*y*). And, therefore, where two writs were at different times delivered to the sheriff against the same defendant, and he seized and sold under the first writ, and, upon the first writ of execution being afterwards set aside by rule of Court, he paid the money over to the defendant, as he was ordered by the rule; he was holden to be liable to the plaintiff in the second action, to the extent of the money levied by him in the first (*z*): he should have applied to the Court, who would have allowed him to pay the money in satisfaction of the second writ of execution, instead of obliging him to pay it over to the defendant. In an action for a false return of *nulla bona* to a *fi. fa.*, if the plaintiff prove the debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returns *nulla bona*; nor, if the sheriff has the proceeds of the goods in his hands, can he defend himself on the ground that the *fi. fa.*, on the return of which the action is brought, was delivered at the sheriff's office at a quarter past six o'clock on the day on which it was returnable (*a*).

*When, where, and how executed.*] The writ may be executed at any time before it is returnable; and even at any time on the day on which it is returnable, if made returnable on any particular day (*b*), although it was formerly holden that it must have been done before the rising of the Court on the return day, and not afterwards (*c*). It may be executed either by day or night (*d*), and on any day except Sunday.

We have seen that when judgment is signed in the lifetime of the

*Loeick v. Crowder*, 8 B. & C. 132, 2 M. & R. 84, S. C.; *Warmell v. Young*, 5 B. & C. 610, 8 D. & R. 443, S. C. See *Payne v. Drew*, 4 East, 523, and *post*, 399, 393, as to what is a fraudulent execution.

(*t*) *Smalcomb v. Buckingham*, Carth. 419; *Payne v. Drew*, 4 East, 523; 1 Salk. 310; *Rybot v. Preckham*, 1 T. R. 731, n.; 2 Bac. Abr. Execution, (D).

(*u*) *Hutchinson v. Johnson*, 1 T. R. 739; *Jones v. Atherton*, 7 Taunt. 56, 2

Marsh. 375, S. C.

(*x*) MS. M. 1815.

(*y*) *Jones v. Atherton*, 7 Taunt. 56, 2 Marsh. 275, S. C.; and see *Cleghorn v. Desanges*, 3 Moore, 83, Gow, 66, S. C.

(*z*) *Saunders v. Bridges*, 3 B. & Ald. 95.

(*a*) *Twome v. Crowder*, 2 C. & P. 355.

(*b*) *Maud v. Barnard*, 2 Bur. 812; *Twome v. Crowder*, 2 C. & P. 353.

(*c*) 2 Saund. 1016; and see *Dyke v. Blackstone*, 2 Ld. Raym. 1449.

(*d*) 2 Ord. 436.

defendant, or of the term in or after which he died, execution may be sued out thereupon against his goods, in the hands of his executors, &c. without reviving the judgment by *scire facias* (*ante*, 374). So, if the defendant die after execution is sued out, the writ may be executed on the goods in the hands of the executor, &c. (*e*). So, if the plaintiff die after execution sued out, the writ may notwithstanding be executed, and his executor, &c. shall have the money (*f*); or, if there be no executor, and administration be not as yet granted, the money shall be brought into Court, and there deposited until some person appear to claim it as representative of the deceased (*g*). The same sheriff who begins the execution must end it, although he go out of office before the sale, &c. (*h*).

The observations made *ante*, 119, as to *where* a writ of *capias* may be executed, will here apply. The authority of the sheriff or officer to whom the writ is directed is confined to the county or place whereof he is sheriff or officer; and if he execute a writ out of it he is a trespasser. The 2 *IV.* 4, c. 39, s. 20, provides, that for the purpose of service and execution of every writ of process, whether *mesne* or judicial, the districts and places which are parcel of some one county, but wholly situate within and surrounded by some other county, shall be taken to be part as well of the county wherein they are situate, as of the county of which they are parcel; and that writs and process may be directed accordingly, and executed in either of such counties.

The sheriff may enter the house of the defendant when the outer door is open to seize the person or goods of the defendant; and this, though neither he nor his goods be therein, if there be reasonable ground for suspecting that he or they were there (*i*); and the sheriff may enter the house of a third person to execute a *ca. sa.* or *fi. fa.* if the defendant or his goods be actually therein (*k*), otherwise not (*l*). On a *fi. fa.* against the goods of an intestate in the hands of the administratrix and her husband, the sheriff may enter the house of the husband to search for the goods of the intestate, though none be found therein (*m*). The sheriff must not remain on the premises longer than is reasonably necessary, for the removal of the defendant or his goods; unless with the license of the defendant or the possessor of the premises, otherwise he would be a trespasser.

The sheriff cannot break open any outer door (*n*) of the party's dwelling-house, in order to execute a writ of execution (*o*); unless in the case of a writ of *seisin*, or *habere facias possessionem*, in which

(*e*) 3 Wils. 399, Comb. 33; *Withers v. Harris*, 2 Ld. Raym. 808, 12 Mod. 130, 241.

(*f*) *Cleve v. Vere*, Cro. Car. 459; *Harrison v. Bowden*, 1 Sid. 29; *Clerk v. Withers*, 2 Ld. Raym. 1073, 1 Salk. 322, 6 Mod. 290, S. C.

(*g*) *Clerk v. Withers*, 2 Ld. Raym. 1073; *Noy*, 73; 2 Bac. Abr. Execution, (L).

(*h*) *Clerk v. Withers*, 1 Salk. 323.

(*i*) *Semayne's case*, 5 Rep. 92.

(*k*) *Id.*

(*l*) *Johnson v. Leigh*, 1 Marsh. 565; *Com. Dig. Execution*, (C.) 5.

(*m*) *Cooke v. Birt*, 5 Taur. 785, 1 Marsh. 333, S. C.

(*n*) He cannot even break open a latch, *see* *Dalt.* 350 H; *Buckingham v. Francis*, 11 Moore, 40.

(*o*) 5 Co. 91; *Semayne v. Gresham*, Moore, 666, Yelv. 28, Cro. El. 908, S. C.; 2 Bac. Abr. Execution, (N).

case he may break open the door, if he be denied entrance by the tenant (p). But, having got entrance at the outer door, he may in all cases break open an inner door, cupboards, trunks, &c. if necessary (q). It seems also that goods may be taken through the window of a house if open (r). There is another exception, also, to the above rule, namely, that when the execution is at the suit of the king (s), (even in the case of a *capias utlagatum* (t)), the sheriff may break open the outer door of the defendant's dwelling-house, having first signified the cause of his coming, and desired admission (u). The rule also extends only to the party's dwelling-house; therefore the sheriff may break open the outer door of a barn or outhouse, not connected or within the same curtilage with the dwelling-house, without a previous demand and refusal of admission (w). So, after such demand and refusal, the sheriff may break open the outer door of a dwelling-house belonging to a third person, if the defendant has upon a pursuit taken refuge there, or his goods be brought there to prevent the execution (x). Or if the defendant, after being arrested on a *capias*, escape into either his own or another's dwelling-house, the officer will be justified in breaking the outer door, to retake him (y). Also, if after a peaceable entrance at the outer door of the party's dwelling-house, the sheriff or his officer be locked in, he may justify breaking open the outer door in order to get out; and the Court would probably grant an attachment against the defendant (z). If the sheriff break open an outer door, when he is not justified in doing so, this does not vitiate the execution, but merely renders the sheriff liable to an action of trespass (a). The Court, however, generally discharges the party out of custody when arrested by such means.

The sheriff cannot enter any of the royal palaces, for the purpose of executing a writ of execution against the person or goods of any person residing in them (b); nor can he do so in the Courts of justice, whilst the justices are sitting; nor in the Tower (c).

The manner in which the several writs of execution must be executed will be mentioned hereafter, while treating of each particular writ.

In executing a writ a sworn and known officer, be he sheriff, under-sheriff, bailiff, or serjeant, need not shew his warrant or writ, although demanded, but a special bailiff must shew his warrant, if the party demands it, otherwise the latter need not obey it (d). And the known officer, upon the execution of the writ, ought to declare the contents

(p) *Semayne's case*, 5 Co. 91.  
 (q) *Rex v. Bird*, 2 Show. 87; *Lee v. Gannet*, Cowp. 1; *Hutchinson v. Birch*, 4 Taunt. 619; *ante*, 120.  
 (r) 1 Roll. Ab. 671, pl. 7.  
 (s) 5 Co. 91 b.  
 (t) *Rex v. Bird*, 2 Show. 87.  
 (u) 5 Co. 91; 4 Leon. 41; *Semayne v. Gresham*, Cro. El. 906, 714.  
 (v) *Penton v. Browne*, 1 Sid. 181, 182.  
 (w) *Semayne's case*, 5 Co. 93a; *Penton*

*v. Browne*, 1 Sid. 186.  
 (x) *Ason*, 6 Mod. 105; *ante*, 120.  
 (y) *White v. Wiltshire*, Palm. 52, Cro. Jac. 555, 2 Ro. Rep. 132, S. C.  
 (z) 5 Co. 93 a; but see 2 Bac. Abr. Execution, (N).  
 (b) *Winter v. Miles*, 10 East, 578.  
 (c) *Batson v. McLean*, 2 Chit. Rep. 51; *ante*, 119.  
 (d) *Mackally's case*, 9 Rep. 69, Bac. Ab. Shff. (N). *Vide Hall v. Roche*, 8 T. R. 156.

of his warrant, as at whose suit he executes it, out of what Court, and when returnable: to the end that he may pay the money (e). If a bailiff execute a writ before it comes to the sheriff's hands, or before the warrant is made on it, the bailiff is a trespasser (f).

*Sheriff's duty, &c. in case of adverse claims.*] See this noticed *post*, Vol. 2, Book 4, Part 1, Chap. 33. **XI**

*When and how returned, and effect of return, &c.*] It is not usual to return writs of execution which are executed, although the sheriff in strictness is bound to do so (g). The *elegit*, however, is an exception to this; for if lands be extended on it, it is absolutely essential that the *elegit* and inquisition should be returned (h). Also, where the execution is against the defendant's goods, it may be advisable to rule the sheriff to return the writ, in order to prevent improper conduct in the officer (i).

The sheriff may be ruled to return the writ either by the plaintiff or the defendant (k); or a Judge's order may be obtained for that purpose in vacation. (2 W. 4, c. 39, s. 15). And he may be so ruled or ordered under a *fi. fa.*, though the defendant has paid the money without a sale (l). But where there has been a compromise between the parties, the sheriff cannot be ruled or ordered to return the writ (m), nor can he be so where the plaintiff has appointed a special bailiff (n), nor where there is any collusion between the sheriff's officer and the plaintiff, or his attorney (o). If improperly ruled to return the writ, it seems the sheriff's course is to move to set the rule aside (p); if improperly ordered by a judge to do so, his course will be to get the order rescinded.

Though the sheriff go out of office he may be still ruled or ordered to return the writ. He is not, however, liable to be called upon to return it, unless required so to do within six months after the expiration of his office (20 G. 2, c. 37, s. 2), that is, six *lunar* months; and the day upon which the sheriff quits his office is reckoned inclusive (q). Also, he must be *ruled* or ordered to return the writ within that time, otherwise he is not bound to do so, although requested before (r).

The mode of obtaining the rule or order to compel the return, the form and service of it, the time for returning the writ after it, and

(e) *Mackally's case*, 9 Rep. 68; *Countess Rutland's case*, 6 Rep. 84 a.

(f) *Greene v. Jones*, 1 Saund. 299, n. 5; ante, 113.

(g) See 5 Co. 90; 4 Co. 67; *Chesley v. Barnes*, 10 East, 73; *Roseland v. Veale*, Cowp. 18.

(h) 5 Co. 90 a; 4 Co. 74; 2 Inst. 306; *Garraway v. Harrington*, Cro. Jac. 549; *Palmer v. Humphrey*, Cro. El. 584.

(i) See *Edmunds v. Watson*, 7 Taunt. 5.

(k) See form of rule, Chit. Forms.

(l) *Edmunds v. Watson*, 2 Marsh. 333, 7 Taunt. 5, S. C.

(m) *Alchin v. Wells*, 5 T. R. 470.

(n) *Pallister v. Pallister*, 1 Chit. Rep. 614, n; *Porter v. Viner*, Id. 613.

(o) *Ruston v. Hatfield*, 3 B. & Ald. 204, 1 Chit. Rep. 613, S. C.

(p) *De Moranda v. Dunkin*, 4 T. R. 119; 2 Bla. Rep. 302.

(q) *Res v. Adderley*, Doug. 463; 2 Saund. 47 m.

(r) *Res v. Jones*, 2 T. R. 1.

when the sheriff will be in contempt for not obeying it, and the mode and time of obtaining an attachment, will be found noticed, *ante*, 131 to 135, the practice in this respect on mesne process being for the most part the same as on final process.

As to who should make the return in general, see *ante*, 132. Where a *ca. ga.* or *fi. fa.* is sued out merely to warrant a *testatum* writ, the attorney may, it seems, make the return (*s*), although in practice it is usual to take it to the sheriff's office for that purpose.

The different returns will be noticed while treating of each particular writ, see *post*, 399, 406, 413. If the bailiff of a liberty have the execution and return of the writ, the sheriff may return, that he commanded the bailiff to execute the writ; and if the bailiff has not made a return, the sheriff should return that fact accordingly; or if he have made a return, the sheriff should return it (*t*). If the bailiff sends an insufficient return, the sheriff should return that the bailiff has made no return (*u*). If the sheriff return, that he commanded the bailiff, &c. when the sheriff himself might have entered the liberty, the return is void (*x*).

The sheriff cannot return a rescue to a writ of execution, as he may do to a writ of mesne process, for he must, by stat. *Westminster 2nd*, raise the *posse comitatus* (*y*).

As to how the sheriff should act as to his return, &c. in the case of adverse claims, see *post*, Vol. 2, Book 4, Part 1, Chap. 11.

The return is made on the back of the writ itself, but, if the return be long, a schedule is usually annexed, and referred to in the indorsement on the writ (*z*). The writ and return are filed with the *custos breviarum*, before or on the day on which the rule to return the writ expires. The *custos breviarum* must indorse the day and hour when it is filed. (*R. H. 2 H. 4, r. 12*). The return must be certain (*a*), and must answer the whole writ (*b*); where a *venditioni caponas* to sell goods levied as to part of the debt, and a *feri facias* as to the residue, were included in the same writ, and the sheriff made a return to the *venditioni exponas*, without making any return as to the *fi. fa.*, it was held bad (*c*). The return must answer the whole writ up to the period when the return is made (*d*). The return must not falsify the writ on the record (*e*), or be contrary to a former return of the sheriff or of his predecessor (*f*). The sheriff ought to put his christian and surname to the return (*g*), but the omission would not render the return

(a) *Palmer v. Price*, 2 Salk. 590.

(t) See forms, Chit. Forms.

(u) Roll. Ab. Return. (M) 2, 3; Watson on Sheriff, 76.

(x) Fitz. Return. 53.

(y) *Mey v. Boslie*, Cro. Jac. 419; *Res v. Holdam*, Barnes, 430; *Slie v. Finch*, 2 Roll. Rep. 37; Wats. Shff. 74; *ante*, 134.

(z) See form, Chit. Forms.

(a) Bro. Return de Hriefe, pl. 8; Rob. Ab. Return, (L); Wats. Shff. 69.

(b) Roll. Ab. Return, (M). 2; Wats. Shff. 69.

(c) *Res v. Sheriff of Middlesex*, 1 Marsh. 344.

(d) See *Palmer v. Potter*, Cro. Eliz. 512; *Perkins v. Mencher*, 1 Dowl. P. C. 21; *Cavenagh v. Collett*, 4 B. & Ald. 279; *Baker v. Davenport*, 9 D. & R. 606.

(e) Com. Dig. Return, (E 4); *Moor v. Watts*, 2 Salk. 581, 1 Ld. Raym. 613, S. C.

(f) Roll. Ab. Return, (E) (F); Vin. Ab. Return, (E) (T).

(g) *Doe v. Maningham*, Plowd. 63; Fitz. Return, 8.

bad, though the sheriff might be amerced (*h*). And when there are two sheriffs, both ought to put their names, or the return would be no return at all (*i*). Where a new sheriff makes a return to a writ which has been executed by his predecessor, (but which is not usual), he should return, that his predecessor delivered it to him, with the latter's return thereon (*j*).

If the return be insufficient, it is as no return, and the Court will grant an attachment against the sheriff who returns it (*k*).

Any defect in the formal part of the return will be cured by the words, "in manner and form as I am within commanded" (*l*). The return may also be in general amended (*m*); and this, although after execution executed; and, in some cases, although the application for the amendment be not made by the sheriff himself (*n*). Where the sheriff, under a *fi. fa.* and a writ of extent, seized not only the defendant's goods, but also goods belonging to a stranger which were on the premises, and the sheriff returned to both writs, that he had seized goods to the amount, but that they remained in his hands for want of buyers; the sheriff being obliged afterwards, by order of the Court of Exchequer, to levy the amount of the extent upon the defendant's goods, and not upon the goods of the stranger, and having no longer goods of the defendant to satisfy the *fi. fa.*, he applied to this Court for leave to amend his return to the latter writ: the Court, however, refused to allow the amendment; saying, that as he had seized sufficient property of the defendant under this writ, he must be accountable to the plaintiff for it; had he, as soon as he received the order of the Court of Exchequer, stated the facts of the case to that Court, they would have relieved him from his embarrassment (*o*).

The return is conclusive between the same parties in the same action, but not against other parties, or in another action (*p*). Even in another action the return is *prima facie* evidence of the facts stated in it (*q*). If the return be false, the party who is injured by it may maintain an action against the sheriff (*r*). The sheriff is generally concluded by his return; and the bailiff of a liberty is, it seems, concluded by it, although false, and his remedy over is against the sheriff (*s*). But the sheriff's officer is not, for the purposes of his own justification, so concluded (*t*).

(*h*) *Dalton v. Thorp*, Cro. El. 767; *sed quære*, see *Watson*, Shff. 69.

(*i*) *Lamb v. Wiseman*, Hob. 70; 11 Rep. 4.

(*j*) *Res v. Sheriff of Middlesex*, 4 East, 604.

(*k*) Roll. Ab. Return, (M), 1, 2; *Wats. Shff.* 76.

(*l*) *Fitz. Return*, 44; *Wats. Shff.* 68.

(*m*) 8 Hen. 6, c. 13, s. 6; *Thorp v. Hook*, 15th Nov. 1832, K. B. MS. See *Res v. Sheriff of Monmouth*, 1 Marsh. 344, and the cases in *Watson*, 71.

(*n*) *Thorp v. Hook*, 18th Nov. 1832, K. B. MS., 1 Dowl. P. C. 80, S. C.

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(*o*) MS. E. 1817.<sup>2</sup> See 2 B. & Ald. 9, 95; but see *Tomlinson v. Thynn*, 4 Moore, 505, 2 B. & B. 77, S. C.

(*p*) *Dalton*, 189; Roll. Abr. Return, (O); *Gibson v. Brooke*, Cro. El. 830; *Morrison v. Downs*, Sir W. Jones, 418.

(*q*) *Gifford v. Woodgate*, 11 East, 297.

(*r*) *Dalton*, 190; Vin. Abr. Return, (O), 47; *post*, 390.

(*s*) *Shaw v. Simpson*, 1 Ld. Raym. 184. When not, under circumstances of bankruptcy; see *Brydges v. Walford*, 6 M. & Sel. 42; *Cutterbuch v. Jones*, 15 East, 78; *post*, 400.

(*t*) *Parker v. Moore*, Cro. Ells. 181.



*Sheriff's poundage and expenses of execution.*] At common law, the sheriff was bound to execute all the king's writs, without any fee or reward; and he cannot now claim any such fee or reward, unless it be provided for by statute (*u*).

Upon executing a *fi. fa.* the sheriff is entitled to 12*d.* for every 20*s.*, if the sum levied do not exceed 100*l.*, and 6*d.* for every 20*s.* over and above that sum; if he exact more, he is liable to a penalty of 40*l.*, one moiety to the king, and the other to the informer, and also to an action by the party grieved for treble damages. (29 *El. c. 4*) (*x*). He cannot charge the expenses of selling the goods by auction, because he is bound to sell the goods himself; yet, if the auction be at the request of the plaintiff or defendant, the party so requesting it must pay the expenses of it (*y*). The sheriff, however, is entitled to the poundage allowed him by the statute, after seizure of the goods, although the parties enter into a compromise before he sells them (*z*), or although the judgment and execution be afterwards set aside for irregularity (*a*). He is not entitled to poundage if the money be paid to him without any levy (*b*); nor where money is paid into Court by the sheriff, under the 43 *G. 3, c. 46, s. 2.* or 7 & 8 *G. 4, c. 71* (*c*). There was some doubt, formerly, who should pay the expenses of the execution of a *fi. fa.*; but now, by 43 *G. 3, c. 46, s. 5*, in every case of execution against the goods of a defendant, "the plaintiff may also levy the poundage, fees, and other expenses of the execution, over and above the sum recovered by the judgment (*d*)". And the plaintiff, in such a case, must take care to levy only such a reasonable sum as would be afterwards allowed upon taxation, otherwise, the Court, upon application, will order the excess to be restored, with costs (*e*). This statute only extends to an execution at the suit of the plaintiff; and where it issues at the suit of the defendant, the expenses of it must, it should seem, be borne by him (*f*). The sheriff is not entitled to the expense incurred in taking and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons (*g*); nor is he entitled to retain anything beyond the regular poundage, for expenses incurred by keeping possession of the goods, in consequence of an injunction (*h*). But the Judges of the Common Pleas seem to have been of opinion that, where the sheriff does any thing beyond his official duty, in allowing time for dividing the property seized into lots, for the benefit of selling

(*u*) See 2 Inst. 210; Wats. Shff 76.

(*v*) See *Anon.* 1 Salk. 331; *Woodgate v. Knatchbull*, 2 T. R. 158; *Res v. Marnock*, 6 Id. 771; *Savage v. Smith*, 9 W. Bl. 1101; *Type v. Glade*, 7 T. R. 267; *Dearon v. Morris*, 2 B. & Ald. 323.

(*y*) *Woodgate v. Knatchbull*, 2 T. R. 157.

(*z*) *Ashin v. Wells*, 3 T. R. 470.

(*a*) *Rawstorne v. Wilkinson*, 4 M. & Sel. 236.

(*b*) *Graham v. Grill*, 2 M. & Sel. 256.

(*c*) *Stewart v. Eractridge*, 2 B. &

Ald. 770, 1 Chit. Rep. 529, S. C.; *Haines v. Narine*, 2 Dowl. P. C. 43; *ante*, 126, 180, 182.

(*d*) See *Rumsey v. Tuffnell*, 9 Moore, 423, 2 Bingh. 255, S. C.

(*e*) *Benicell v. Oakley*, 2 Taunt. 174.

(*f*) *Baker v. Spade*, 7 Taunt. 179. See *Woodgate v. Knatchbull*, 2 T. R. 158.

(*g*) *Bilke v. Havlock*, 3 Camp. 374.

(*h*) *Buckle v. Beccles*, 3 B. & C. 688, 5 D. & R. 506, S. C.

them to more advantage, *at the instance of the defendant*, the officer is entitled to some remuneration beyond poundage (*i*).

Upon executing a *ca. sa.* the sheriff is entitled to 12*d.* in every 20*s.* if the sum do not exceed 100*l.*; and 6*d.* for every 20*s.* over and above that sum, in the same manner as upon the *fi. fa.*; (29 *El. c. 4*); to be calculated upon the amount of the debt really due, and marked on the back of the writ. (3 *G. 1. c. 15, s. 17*). And the sheriff is entitled to this poundage, although the defendant go to prison without paying the debt (*k*); or, although the defendant be already in custody of the sheriff when the *ca. sa.* is delivered to him (*l*). The plaintiff cannot levy under a *ca. sa.* the poundage, officers' fees, or other expenses of the execution, above the sum recovered by the judgment, unless the judgment was for a penalty, or there be an express authority for such levy by the defendant's agreement.

Upon executing an *elegit* or *habere facias possessionem*, the sheriff is entitled to 12*d.* in every 20*s.* of the yearly value of the lands, &c. whereof possession or seisin shall be given, if such yearly value exceed not the sum of 100*l.*; and 6*d.* in every 20*s.* of the yearly value above that sum. (3 *G. 1. c. 15, s. 16*) (*m*). But, where the goods are taken under an *elegit*, the sheriff is entitled *pro tanto* to poundage, as he would under a *fi. fa.*

Upon executing a writ of *levari facias* for a crown debt, the sheriff is not entitled to poundage (*n*).

The sheriff may maintain an action for his poundage, &c. (*o*); or he may retain it out of the money levied under the execution. But he cannot refuse to execute a writ until his fees are paid (*p*). Nor is he justified in taking goods to secure his poundage, after he has consented to their being delivered to a third person under a claim of property (*q*).

Besides the remedy given by the above statute of 29 *Eliz.*, the party upon whom the extortion is committed may maintain an action for money had and received against the sheriff. The party guilty of the extortion may also be indicted at common law (*r*). The sheriff may be sued, but not indicted for the extortion of his officer (*s*). The treble damages mentioned in the statute of *Eliz.* are calculated at three times the amount of the damages found by the jury (*t*); the damages themselves being, in general, the sum overcharged (*u*).

*How far a discharge of judgment, and remedy for amount levied.]*  
This will be found while treating of the particular writs of execution.

(i) *Stevens v. Rothwell*, 9 Moore, 338,

3 Brod. & B. 143, S. C.

(k) *Lake v. Turner*, 4 Bur. 1981.

(l) Tidd, 9th ed. 1040.

(m) See *Price v. Hollis*, 1 M. & Sel. 105.

(n) *Stevens v. Rothwell*, 6 Moore, 338, 3 B. & B. 143, S. C.

(o) *Tyson v. Paske*, 2 Ld. Raym. 1212, 1 Salk. 333, S. C. See *Rawstorne v. Wilkinson*, 4 M. & Sel. 256, 5 B. & C. 328, 1 R. & M. C. N. P. 314.

(p) *Hercott's case*, 1 Salk. 330.

(q) *Goode v. Langley*, 7 B. & C. 26.

(r) *Smith v. Mall*, 2 Roll. Rep. 263, Palm. 318, S. C.

(s) *Woodgate v. Knatchbull*, 2 T. R. 148, per Gould, J.; *Sanderson v. Baker*, 3 Wils. 316.

(t) *Woodgate v. Knatchbull*, 2 T. R. 159; *Buckle v. Bowes*, 6 D. & R. 1, 4 B. & C. 154, S. C.

(u) *Woodgate v. Knatchbull*, 2 T. R. 158; and see 3 B. & C. 668, 5 D. & R. 496, S. C.

(*Post*, 401, 407, 414). As to, the entry of satisfaction on the roll, see *post*, 437.

**Contribution.]** If execution be sued out against two or more persons, and the whole amount be levied upon one, in actions *ex contractu*, the party upon whom the whole is levied may maintain an action against the others, and oblige them to contribute their respective shares; but in actions *ex delicto* he cannot thus compel a contribution, and he is, in general, altogether without remedy. (*Ante*, 309).

**Irregular execution.]** If there be any irregularity in the execution of the writ, the same may be set aside, and in general with costs: and if goods or money have been levied under it, the Court or a Judge will order them to be restored, or if the party be in custody under it, they will order him to be discharged. The application to set aside the execution should be made as early as possible, and, generally speaking, at all events, before the end of the term in which the writ is returnable (*v*). In moving to set aside a *ca. sa.*, on the ground of a misnomer, the affidavit should be intituled in the right name (*x*). In setting aside the execution, the Court will, in general, restrain the defendant from bringing any action, unless a strong case of damage be shewn (*y*), or the judgment and execution were against good faith (*z*). Although the judgment and writ be irregular, yet, unless set aside, the party may justify under it (*a*); and, whether set aside or not, the sheriff, or his officer, is in general protected by them, however irregular (*b*), provided it be not *void*, and provided he do not join in the same plea with the party (*c*). A *bond fide* purchaser also will gain a title under the sheriff, unless the writ were *void* (*d*). If the judgment or execution has been set aside for irregularity, the party who issued it, and his attorney, cannot justify under it (*a*). It may be as well observed, that an action will lie for issuing execution for too much (*e*).

**Restitution.]** If, after money is levied under a writ of execution, the judgment be afterwards reversed or set aside, the party against whom the execution was sued out shall have restitution. If a term or goods be sold under a *fi. fa.*, it is only the money for which they were sold, and not the term or goods themselves, which shall be restored (*f*); but, if the judgment be reversed before the term or goods are sold, the term or goods, of course, must be delivered back to the party (*g*). So, if lands be extended, or chattels delivered to the party *per rationabile pretium et estentum*, under an *elegit*, and the

(v) See *post*, Vol. 2, 782, 794.

(x) *Thorpe v. Hook*, 1 Dowl. P. C. 494; *post*, Vol. 2, Chap. 34.

(y) *Lorimer v. Lule*, 1 Chit. Rep. 134, 238; *Wentworth v. Bullen*, 9 B. & C. 840.

(z) *Cash v. Wells*, 1 B. & Adol. 375.

(a) *Phillips v. Biron*, 1 Stra. 809.

(b) *Rex v. Sheriff of Middlesex*, 5 B. & Ald. 746; *Jess v. Lucas*, 1 C. & P. 7.

(c) *Phillips v. Biron*, 1 Stra. 809; *Rex v. Harrison*, 15 East, 615; *Bates v. Pyl*

*Ing.* 6 B. & C. 38, 9 D. & R. 44, S. C.

(d) 1 Ves. 196; *Doe v. Murree*, 6 M. & S. 110; *Doe v. Thorn*, 1 M. & Sel. 425; *Dyer*, 363, pl. 24, *infra*.

(e) *Wentworth v. Bullen*, 9 B. & C. 840.

(f) Ro. Abr. 778; 8 Co. 19, 143; *Byre v. Woodfine*, Cro. El. 278; 2 Bac. Abr. Execution, (Q); *Doe v. Thorn*, 1 M. & Sel. 425.

(g) See 2 Ro. Abr. 491.

judgment be afterwards reversed, the lands or chattels shall be restored, and not merely the extended value (*h*). As to the mode of restitution, where the judgment has been reversed for error, see *ante*, 357. But where the judgment is set aside for irregularity, &c., restitution (when necessary) forms part of the rule; and if the goods or money be not restored, the Court will, of course, grant an attachment (*i*).

## 2. Fieri Facias.

*What, and form of.*] The writ of *fieri facias* is a judicial writ that lieth for him which hath recovered any debt or damages in the King's Courts. In substance, it is a command to the person to whom it is directed, that, of the goods and chattels of the party, he cause to be made the sum recovered by the judgment (specifying it according to the form of the action), and that he have the money, and the writ itself, before the King, at Westminster, on the day on which the writ is returnable (*k*); or, if it be made returnable immediately after execution, at the time of such return. This writ of *fieri facias*, and the writ of *levari facias*, were the only writs of execution at common law; excepting in actions of trespass, in which the *capias ad satisfaciendum* was allowed.

As to the direction, *teste*, and return of the writ, see *ante*, 378. This writ, like other writs of execution, must strictly pursue the judgment, and be warranted by it, or it will be void, see *ante*, 376, and the instances there.

If the sheriff return *nulla bona*, the party may sue out an *alias fi. fa.*, and upon the return of that, a *pluries* writ, into the same county; or he may have a *testatum fi. fa.* into another county; and each of these writs may contain a clause of *non omittas* when necessary (*k*); and when such writ is necessary, see *ante*, 98, *post*, 409.

If it be required to have execution of the defendant's goods in a different county from that in which the venue in the action was laid, the writ must be a *testatum* writ, and you must first sue out a *fi. fa.* directed to the sheriff of the county where the venue was laid, in order to warrant it (*l*). Regularly, the *testatum* should be tested on the return day of the previous writ (*m*); and the same in the case of *alias* and *pluries* writs. But the Court are so far from being strict in this respect, that they will never inquire when the previous writ was tested or sealed; nor will they in general set aside an execution under a *testatum* writ, for any defect in this respect (*n*). Therefore, in practice, it is usual to sue out the *fi. fa.* and *testatum* at the same time; and leave the one to be returned *nulla bona*, and the other to be executed; and, indeed, a *fi. fa.* returnable before judgment affirmed was held good in favour of execution to warrant a *testatum* (*o*). If, however, you sue out the *testatum* only, and the other party seek to set aside the execution on that account, you may remedy the defect by suing

(*h*) Ro. Abr. 778; *Goodyere v. Ince*, Cro. Jac. 246, Yelv. 179, S. C.; 2 Bac. Abr. Execution, (Q).

(*i*) *Anon.* 2 Salk. 588; and see a form of a notice to the sheriff to retain the money levied, Chit. Forms, 686.

(*k*) See the forms of *fi. fa.*, Chit.

Forms, 255, &c.

(*l*) *Brand v. Meare*, 3 T. R. 388.

(*m*) In actions by original it was tested on the *quarto die post*.

(*n*) *Boulmouthe v. Pilkington*, T. Jon. 200.

(*o*) *Austin v. Crisley*, 7 Mod. 139.

out a *fi. fa.* to warrant the *testatum*, and getting it returned, and by entering the writ, return, and award of *testatum* on the roll, and producing it in Court when you shew cause (*p*). Or even where a *fi. fa.* is directed to the sheriff of another county, instead of a *testatum*, the plaintiff, upon suing out such a *fi. fa.* as would warrant the former one if it had been a *testatum*, and making the entry on the roll, as above mentioned, may, according to some decisions, have leave to amend the former *fi. fa.* even after error brought (*q*).

You may issue out several writs of execution at the same time. (*Ante*, 375). As to how far you must wait till the return day, if the writ be in part executed, see *ante*, 376.

*When to be sued out.*] As to this see *ante*, 373, 374.

*How sued out and indorsed.*] Engross your writ upon a plain piece of parchment, and get it sealed: pay 7d.; or, for a non omittas, 1s. 2d. It need not be signed. (*R. H. 2 W. 4, r. 75*). At the time you get the writ sealed, you must produce to the sealer of the writs the postea, judgment paper, or inquisition; (*Id. R. H. 2 & 3 G. 4*); and, if any, the Judge's certificate for immediate execution. Indorse it thus: "Levy the whole, (or £ , or whatever sum you are entitled to levy for) besides sheriff's poundage, officers' fees, and other incidental expenses. P. A., James Street, plaintiff's attorney." Also, indorse on the writ the addition and place of abode of the defendant, or such other description of him as you may be able to give. (*R. H. 2 & 3 G. 4*) (*r*). Either leave it at the sheriff's office, with directions to give the warrant to the officer you intend should execute it; or give it, in the first instance, to the officer, who will procure the warrant upon it (*s*). The officer will thereupon execute the writ.

*When, where, and how executed.*] As to when and where writs of execution may in general be executed, see *ante*, 380, 381. As to how far doors may be broken open, see *ante*, 381. As to the necessity for shewing the warrant, &c., see *ante*, 382.

The officer, in execution of this writ, enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them (*t*). Seizing part of the goods in the name of the whole is a good seizure of the whole (*u*). He then gets an auctioneer to make an inventory of them, and to remove and sell them, or to sell them on the premises, if the defendant or the person on whose premises the goods are consent to it (*v*). He is allowed to remain on the premises a reasonable time to remove the goods. It is the sheriff's duty to remove the goods to a place of safe custody until they can be sold; for, if they be rescued, the sheriff is liable to the plaintiff for their value (*w*). And it is said if the sheriff take cattle, and returns that he has taken cattle to the value of 100*l.*, and afterwards

(*p*) *Brand v. Moore*, 3 T. R. 368; and see *Milstead v. Coppard*, 5 T. R. 272; *Shaw v. Maxwell*, 6 T. R. 450.

(*q*) *Copperthwaite v. Oscon*, 3 T. R. 657; *Mayer v. Ring*, 1 H. Bl. 541; *Allen v. Allen*, 2 W. Bl. 684; but see *Hunt v. Freeman*, 4 M. & Sel. 339; *Phillips v. Turner*, 3 M. & P. 562, 6 Bingh. 237, S. C.

(*r*) A *ca. ad.* has been set aside for non-compliance with this rule. *Clerke*

*v. Palmer*, 9 B. & C. 153.

(*s*) See form of warrant, Chit. Forms, 273.

(*t*) See *Blades v. Arundale*, 1 M. & Sel. 711.

(*u*) See *Cole v. Davies*, 1 Ld. Raym. 724.

(*v*) See *Alkenhead v. Blades*, 5 Taunt. 198.

(*w*) *Sly v. Finch*, Cro. Jac. 514.

the cattle die for want of meat, he is answerable for the value returned (x).

The sheriff cannot keep the goods himself, and pay the plaintiff his debt (y), nor deliver them to the plaintiff in satisfaction of his debt, as may be done on an *elegit* (z); but they must be sold, if the defendant do not immediately satisfy the plaintiff for the debt, costs and expenses. There is no objection, however, to selling them to the plaintiff, or to any person in trust for him, at their real value (a). The sheriff may sell the goods after the return of the writ, even after he is out of office, without a writ of *venditioni exponas* (b). The sheriff is not obliged to sell the goods by public auction; indeed, if he sell them by auction, the expense attending it will fall on himself, unless the plaintiff or defendant expressly require the auction (c). It seems that if a very inadequate price be offered for the goods, the sheriff should not sell them; but should return that they remain in his hands for want of buyers, and wait until he shall be served with a *venditioni exponas*, under which he will be obliged to sell them for whatever price may be offered (d). If the sheriff wilfully delay to sell for an unreasonable time, and thereby injure the defendant, he would be liable to an action (e); and he would, it seems, be so liable to the plaintiff if he thereby injured him (f).

The sheriff, under a *fieri facias*, cannot sell an estate in fee or for life (g), unless, perhaps, an estate *pur autre vie* (h); but he may sell leases or terms for years belonging to the defendant, and execute an assignment of them, under his seal of office, to the purchasers (i); or an annuity for years (j). And it seems that an outstanding term, vested in a trustee upon trust to attend the inheritance, may be seized in execution against the *cestui que trust*, the owner of the inheritance (k). He cannot, however, sell an equity of redemption, for the legal estate in such a case is in the mortgagee (l). When he sells a term for years, he cannot turn the tenant in possession out, in order to give possession to the purchaser (m), unless perhaps where the defendant himself is in possession (n); but the purchaser must bring his ejectment, in order to obtain the actual possession. If the tenant, however, will voluntarily relinquish possession, the sheriff of course may give possession to the purchaser (o).

The sheriff, under the writ, cannot sell any things fixed to the freehold, and which go to the heir and not to the executor (p), such

(x) Id. 515; *Clerk v. Withers*, 2 Ld. Raym. 1075, 1 Saik. 322, S. C.

(y) Noy, 107.

(z) *Thomson v. Clerk*, Cro. EL 504; *Langdon v. Wallis*, 1 Lutw. 589; *Bealy v. Sampson*, 2 Vent. 95.

(a) Comb. 452; *Leader v. Danvers*, 1 B. & P. 360; 2 Bac. Abr. Execution, (C), 4.

(b) *Doe v. Douston*, 1 B. & Ald. 230, *Ayre v. Aden*, Cro. Jac. 73; *Yelv.* 44; *Wats. Shff.* 188; *sed vide Langdon v. Wallis*, 1 Lutw. 589; 2 Saund. 47 m.

(c) *Woodgate v. Knatchbull*, 3 T. R. 157; *ante*, 388.

(d) *Keightley v. Birch*, 3 Camp. 321; but see *Barnard v. Leigh*, 1 Stark. 43.

(e) *Curtis v. Parkins*, 3 Stark. 163.

(f) *Aitken v. Davis*, 9 Bingh. 740; *Doker v. Hasler*, 2 Bingh. 479.

(g) 3 Co. 13.

(h) Comb. 391.

(i) 3 Co. 13; 8 Id. 171; *Taylor v. Cole*, 8 T. R. 394; and see 2 Saund. 68 c; *Doe v. Douston*, 1 B. & Ald. 230.

(j) *York v. Twine*, Cro. Jac. 79.

(k) *Doe d. Phillips v. Evans*, 1 C. & M. 450.

(l) See 3 Atk. 729; and see *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 New Rep. 461; *Tidd*, 9th ed. 1008.

(m) *Ray v. Deane*, 2 Show. 85.

(n) *Taylor v. Cole*, 3 T. R. 298.

(o) Id. 308.

(p) *Winn v. Ingilly*, 5 B. & Ald. 625, 1 D. & R. 247, S. C.; and see *Steward v.*

as furnaces, ovens, doors, windows, &c. (q), hearths, chimney pieces, &c. (r). But he may sell utensils fixed by the defendant for the purposes of his trade, such as coppers, vats, or the like (r). So he may cut down corn growing on the land, and other emblements (s). So he may sell fixtures which may be removed by the tenant (t). (See the 56 G. 3, c. 50, as to the sheriff's course as to selling and carrying off crops, &c., where there are covenants, &c., restraining the defendant from so doing).

The sheriff, however, may seize and sell all the personal chattels belonging to the defendant he can find (u), and which can be sold (x), with the exception of wearing apparel actually in use (y). But he cannot sell absolutely goods which are pawned or gaged for a debt with the defendant, nor goods demised or let to him for years (z), nor goods of his which are distrained (a). Though, indeed, goods pawned or leased may be taken in execution and sold, subject to the right of the pawnee or lessee (b); and the sheriff is not, it seems, liable to any action for selling the entire property, unless he be informed of the defendant's having only a special property therein (c). Goods in custody of the sheriff under a former execution cannot be seized (d), unless it were fraudulent (*ante*, 379; *infra*), or unless he have returned *nulla bona* to the former writ (e). Nor can he take any thing which cannot be sold, such as deeds, writings, bank notes, &c. (f); and the Court are so strict in this respect, that where the sheriff has money of the defendant's in his hands, whether the produce of an execution at the suit of the defendant (g), or even the surplus of a former execution against him at the suit of the same plaintiff (h), they will not stay such money in the sheriff's hands, to satisfy a present execution (i). But money found in the defendant's possession may, it seems, be taken (j). It appears to have been decided in one case, that, when the sheriff returns *nulla bona*, and there be a recovery against him for a false return, that vests no property of the goods in him or the plaintiff, but they remain in the defendant, and are liable to a subsequent execution for his debt (k); but according to a more recent decision this is incorrect (l). If a party having a lien on goods cause them to be taken in execution at his own suit, he loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises (m).

When the defendant has sold or assigned his goods and chattels before the writ is executed, in some cases the sheriff may seize and

*Lumbe*, 4 Moore, 281, 1 B. & B. 506, S. C. 1 Y. & J. 398.

(q) Com. Dig. Execution.

(r) *Poole's case*, 1 Salk. 368; *Ehoss v. Maw*, 3 East, 38.

(s) *Id.*

(t) *Id.* 3 Ark. 13; and see *M'Clell*. 217; 3 B. & C. 368.

(u) 3 Co. 12.

(v) Com. Dig. Execution, (C. 4).

(w) Com. Dig. 368.

(x) *Dean v. Whitaker*, 1 C. & P. 347;

*Dough v. Spethwoods*, 3 C. & P. 435;

*Isaacs v. Lamb*, 1 C. & J. 33.

(y) *Bro. Abr. Pledges*, 38; Dy. 67 b, in marg.; Com. Dig. Execution, (C. 3).

(z) *Scott v. Schuyler*, 6 East, 476. See form of returns, Chit. Forms, 274.

(a) *Dean v. Whitaker*, 1 C. & P. 347.

(d) *Letchemere v. Thoroughgood*, 3 Mod. 236; *Backhurst v. Chinkard*, 1 Show. 173.

(e) *Tuome v. Crowder*, 2 C. & P. 355; 2 Vern. 231.

(f) *Francis v. Nash*, Hardw. 53; and see *Staple v. Bird*, Barnes, 214.

(g) *Knight v. Criddle*, 9 East, 48; *Padfield v. Brine*, 3 B. & B. 204, 7 Moore, 127, S. C. See *Armistead v. Philpot*, 1 Doug. 231, *contra*.

(h) *Fildhouse v. Croft*, 4 East, 510.

(i) *Willous v. Ball*, 2 New Rep. 376.

(j) *Armistead v. Philpot*, 1 Doug. 231; Tidd, 9th ed. 1012.

(k) 2 Vern. 230.

(l) *Clegg v. Woolton*, MS. 1832.

(m) *Jacobs v. Latour*, 5 Bingh. 130.

2 M. & P. 201, S. C.

sell them notwithstanding such sale or assignment. If the defendant have sold them, even for a valuable consideration, after the delivery of the writ to the sheriff, the sale is void, (*see ante*, 379), unless it were in market overt (*n*). Or if the assignment, &c., were not for a valuable consideration, (*see ante*, 379), or if colourable merely, and not *bona fide*, it would be void, at least if made after the time the writ bears *teste* (*o*). (3 H. 7, c. 4. 50 Ed. 3, c. 6. 3 R. 2, st. 2, c. 3. 13 El. c. 5).

The goods of a woman cohabiting with the defendant cannot be taken in execution, although she pass for his wife (*p*). It has been indeed questioned whether a woman, who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking in an execution against the man her goods, being in the house in which the cohabitation took place: but in such case it may be left to the jury to say whether they think, that, under the circumstances, the property was given up by the woman to the man, and if they do, they may find a verdict against her (*q*). The sheriff may sell a term vested in a husband in right of his wife, upon an execution against the husband (*r*), unless it have been vested in trustees for the benefit of the wife, before marriage. But goods vested in trustees before marriage, for the benefit of the wife, cannot be taken in execution for the husband's debt, although he be actually in possession of them at the time of the execution (*s*). The trustees must have the legal interest (*t*). On a *fi. fa.* against the wife, who marries pending the action, it is irregular to take the husband's goods (*u*).

The goods of a testator or intestate cannot in general be taken in execution for the debt of the executor or administrator (*x*).

Indeed, in all cases, the sheriff must at his peril execute the writ only on the goods of the party therein mentioned; for, if he seize the goods of a stranger, he will be liable to an action of trespass (*y*). And where the growing crops of a tenant were seized under a *fi. fa.*, and a *habere facias possessionem* in an ejectment at the suit of the landlord, on a demise prior to the issuing of the *fi. fa.*, was afterwards, and before any sale under the *fi. fa.*, delivered to the sheriff; it was holden that the sheriff was not bound to sell the crops under the *fi. fa.*, for they could not be considered, in point of law, to belong to the tenant, as he was merely a trespasser from the day of the demise in the ejectment (*z*). If the sheriff have any doubt upon the subject, he may impanel a jury to inquire in whom the property of

(n) 2 Eq. Ca. Abr. 381.

(o) See in general as to what is evidence of a fraudulent assignment, Rosc. 486; Tidd, 1004.

(p) Edwards v. Bridges, 2 Stark. Rep. 396; Glasspool v. Young, 9 B. & C. 601.

(q) Edwards v. Farebrother, 3 C. & P. 524, 2 M. & P. 293, S. C.; and see Langford v. Foot, 2 M. & Scott, 349.

(r) Farr v. Neuman, 4 T. R. 638.

(s) Cadogan v. Kennett, Comp. 432; Jarman v. Worlston, 3 T. R. 618; and see 2 Vern. 239; Darby v. Smith, 8 T. R. 82; Nunn v. Williams, 1d. 521; Dewey v. Bayntun, 6 East, 287.

(t) Innd v. Lamb, 1 C. & J. 25.

(u) Doe d. Tuggart v. Butcher, 3 M. & Sel. 527.

(x) Farr v. Neuman, 4 T. R. 631; Gaskell v. Marshall, 2 M. & M. 129; *aliter* if the executor has made the goods his own. See Quick v. Staines, 1 B. & P. 293.

(y) Bro. Abs. Trespass, 98; Kellw. 119; Ackworth v. Kemp, 1 Doug. 40; Sanderson v. Baker, 2 W. Bl. 822, 3 Wils. 309, S. C.; and see Emerson v. Wood, 3 Taunt. 266; Smith v. Plomer, 15 East, 607; Ladbroke v. Crickett, 2 T. R. 646; Guthrie v. Wood, 1 Stark. 287.

(z) Hodgson v. Gossage, 5 B. & Ad. 22.



the goods is vested (a); which will have the effect of indemnifying the sheriff in making a return of *nulla bona* (b), or will mitigate the damages in an action of trespass, if he have seized and sold the goods (c). The Court will not set aside such an inquisition (d). In a late case, where D., having given a *cognovit* for 357*l.* mortgaged certain premises as a security for the payment of that sum and the costs of the judgment, and all other costs and charges whatsoever attending the same; and the mortgagee having levied execution, D. stated that certain goods levied were not his property, and the sheriff by inquisition having ascertained that they were, the mortgagee was holden entitled to claim of D. the costs of the inquisition, if he had paid them to the sheriff (e).

Upon the same principle, the sheriff cannot seize the goods of a party who has previously become bankrupt; because the goods in that case belong, not to the bankrupt, but to his assignees (f); and if, in such case, the seizure of the goods under the writ, and the act of bankruptcy, happen on the same day, it is open to inquire at what time of the day they took place, respectively; and if the goods were actually seized before the act of bankruptcy, the execution will be valid, and the goods may in general be sold at any time, to satisfy the judgment (g). But, in general, if seized after the act of bankruptcy, although sold before the issuing of the commission (h); or if the execution be fraudulent or collusive, as for instance, if, upon a writ of execution sued out before an act of bankruptcy committed, a warrant be made out, directed to the defendant's own shopman, who takes possession and conducts the business as usual (but without the interference of the defendant), and on the day after the defendant commits an act of bankruptcy (i), or if the warrant be made out to a sheriff's officer, but he be directed by the plaintiff not to sell, but merely to leave a man in possession, and the defendant be allowed to carry on his trade in the house as usual for some months, until he become bankrupt (j), or the like; in these cases the goods seized will pass to the assignees under the assignment, notwithstanding the execution (k). Executions, however, levied two calendar months previously to a commission of bankrupt being sued out, are valid, notwithstanding a prior act of bankruptcy, provided the parties at whose suit they are levied had no notice of the prior act of bankruptcy at the time of levying them; (6 G. 4, c. 16, s. 81) (l); or even if the commission be sued out sooner, yet the sheriff is not liable to any action for executing the writ, if at the time he executed it he had no notice of the act of bankruptcy (m). This 81st section applies to all executions, and is not, it

(a) Bro. Abr. Trespass, 90; Kellw. 119; *Farr v. Newman*, 4 T. R. 633, 641.

(b) *Roberts v. Thomas*, 6 T. R. 181; but see *Glossop v. Poole*, 3 M. & Sel. 175, contra; 1 Arch. Pl. & Ev. 373, 375.

(c) Dalt. 146; *Ackworth v. Kemp*, 1 Doug. 40.

(d) *Roberts v. Thomas*, 6 T. R. 88.

(e) *Doe d. Holt v. Roe*, 4 M. & P. 177, 6 Bingh. 447, S. C.

(f) *Smallcomb v. Cross*, 1 Ld. Raym. 229; and see *Hindle v. Bell*, 4 Camp. 383.

(g) *Giles v. Grover*, 9 Bingh. 128; *Godson v. Sanctuary*, 1 N. & M. 52, 4

B. & Adol. 255, S. C.; *Sadler v. Leigh*, 4 Camp. 197; *Thomas v. Deninges*, 2 B. & Ald. 586; *Head v. Gancogne*, 8 Taunt. 527. See *Clutterbuck v. Jones*, 15 East, 78.

(h) *Lazarus v. Waishman*, 5 Moore, 313.

(i) *Jackson v. Irwin*, 2 Camp. 48.

(j) *Toussaint v. Hartop*, Holt, C. N. P. 335.

(k) Archb. B. L., 4th ed. 156.

(l) See Arch. Bkt. L. 171.

(m) *Timbreil v. Mills*, 1 W. Bl. 205; *Hutchin v. Campbell*, 2 Id. 839; and see *Smith v. Miles*, 1 T. R. 475; *Cooper v.*

seems, affected by the 108th section, *infra*. Under a *fi. fa.* upon a judgment founded on a warrant of attorney, the sheriff seized at 11 o'clock on the 13th of August; a commission of bankrupt issued against the debtor at a later hour, on the 13th October, in the same year: the sale took place subsequently to the issuing of the commission: it was held, 1st, that the seizure was a "levying" within the above 81st section; 2ndly, that more than two months had elapsed between the seizure and the issuing of the commission; and, 3rdly, that the execution was not within the 108th section, *infra* (n). Executions upon judgments entered up on warrants of attorney or *cognovits*, are, by the 3 G. 4, c. 39, s. 2, declared void as against the assignees under a commission of bankrupt against the defendant, unless such warrant of attorney, or a copy thereof, or such *cognovit* respectively have been filed, in the manner pointed out by the statute within twenty-one days from the day of the execution thereof, or unless judgment be signed and execution issued within the same time; (*see post*, Vol. 2, Book 2, Part 4, Chap. 1); and the second section of this act is not repealed by the 6 G. 4, c. 16, s. 81; therefore, where the warrant of attorney was not filed as directed by the 3 G. 4, c. 39, and execution issued after an act of bankruptcy, but more than two months before the commission issued, it was held not to be a case within the 6 G. 4, c. 16, s. 81; but whether it would have been within the section, if execution had been executed before any act of bankruptcy, has not been decided (o).

By the 108th section of the bankrupt act, 6 G. 4, c. 16, "no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of, or lien upon, any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." This section of the statute is materially altered by the recent provision of the 1 W. 4, c. 7, s. 7, whereby "no judgment signed or execution issued after the passing of this act, (11th of March, 1831), on a *cognovit actionem* signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the Court in any action commenced *adversely*, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the provision of the 6 G. 4, c. 16, s. 108." This does not, however, it seems, extend to judgments or executions on warrants of attorney (p), or *cognovits*, &c. where the action was not commenced *adversely*. Before this statute of 1 W. 4, where the creditor entered up judgment under a warrant of attorney, issued a *fi. fa.*, and took from the sheriff before the bank-

Chitty, 1 Bur. 20; *Lee v. Lopes*, 15 East, 230. See *Balme v. Hutton*, 1 C. & M. 262, 3 M. & Scott, 1, 2 C. & J. 19, S. C. A writ of error is now pending in the House of Lords in this case.

(n) *Godson v. Sanctuary*, 1 N. & M. 52, 4 B. & Adol. 255, S. C.

(o) *Wilson v. Whittaker*, 1 M. & M. 8.

(p) *Croftfield v. Stanley*, 4 B. & Adol. 87.

ruptcy a bill of sale of the goods seized, it was held, in an action of trover brought by the creditor against the assignees, that the seizure and sale being perfect and complete before the act of bankruptcy, the creditor was in fact paid, and therefore was not at the time of bankruptcy, a "creditor having security" within the meaning of the 108th section (q); and although the act of bankruptcy be committed before the return of the writ (r). But, if the act of bankruptcy is committed before the sale, it is the duty of the sheriff, having notice of the bankruptcy, to pay the amount to the assignees, and if afterwards paid over to the execution creditor, the sheriff will be liable to an action by the assignees, for money had and received (s). But the Court of King's Bench will not interfere in a summary way, by motion, to compel the sheriff to pay over the proceeds of the sale to the assignees (t). The above 108th section applies only to such executions as are not within the protection of the 81st section, *ante*, 394, that is, such executions as have been levied less than two months before the issuing of the commission (u).

If the writ be executed upon goods which the bankrupt has acquired since his bankruptcy, though upon a judgment in respect of a debt provable under the commission, the execution will be valid if the bankrupt's certificate be not then signed and allowed (v). Yet if it be allowed at any time before the goods are sold, the Court will order them to be restored, upon motion (w). And in a late case, where the after-acquired goods of a certificated bankrupt had been taken in execution for a debt which might have been proved under the commission, the Court, on motion, set aside the *fi. fa.*, and refused to put the bankrupt to an *audita querela*, though it was stated on behalf of the creditor, that the bankruptcy was collusive, and that, in an action by the assignees, a jury had found against the plaintiffs as to the fact of the trading (x). But in another case, the Court put the defendant to an *audita querela* (y). As to the execution against the future effects of a bankrupt, who has twice become so, *see post*, Vol. 2, 688.

By the 7 G. 4, c. 57, s. 33, it is enacted, that the 3 G. 4, c. 39, (*ante*, 395), shall extend to the provisional or other assignee of every prisoner, who shall, after the expiration of twenty-one days next after his execution of such warrant of attorney, or giving of such *cognovit actionem* as therein mentioned, apply by petition to the insolvent court for his discharge, as if such act had been expressly therein enacted; and every such warrant of attorney, and judgment, and execution thereon, and every such *cognovit actionem*, and judgment entered up thereon, and execution taken out on such judgment, as are declared by that act to be fraudulent and void against the assignees mentioned therein, shall be deemed equally fraudulent and void against the provisional or other assignee of such prisoner, appointed under the insolvent act, and who shall be entitled to recover back and receive,

(q) *Wymer v. Kumble*, 6 B. & C. 479; *Morland v. Pellatt*, 8 B. & C. 722.

(r) *Higgins v. M'Adam*, 3 Y. & J. 1.

(s) *Notley v. Buck*, 2 M. & R. 68, 8 B. & C. 160, S. C. See *Croxford v. Stanley*, 4 B. & Adol. 87. *Quære* as to when trover will lie; see *Balme v. Eulton*, *ante*, 385, n.

(t) *In re Wankburn*, 2 M. & R. 374,

8 B. & C. 404, S. C.

(u) *Godson v. Sanctuary*, 1 N. & M. 52, 4 B. & Adol. 255, S. C.

(v) *Cullen v. Mayrick*, 1 T. R. 361.

(w) *Lister v. Mundell*, 1 B. & P. 427; *Davis v. Shapley*, 1 B. & Adol. 54.

(x) *Burrows v. Poole*, 1 Id. 629.

(y) *Hanson v. Blakey*, 1 M. & P. 261. 4 Binsh. 493, S. C.

for the use of the creditors of such prisoner, the monies levied and effects seized under or by virtue of any such judgment or execution.

By sect. 34 of 7 G. 4, c. 57, no execution under a warrant of attorney or *cognovit* shall be available against the goods of an insolvent after the commencement of his imprisonment. And it has been held that the sheriff will be liable in trover for selling, after notice of assignment to the provisional assignee, the goods of an insolvent taken in execution under a judgment on *cognovit* after the commencement of the insolvent's imprisonment, but before the assignment (z).

Under a *fi. fa.* against one of two partners, the sheriff may seize the goods of both, and sell the defendant's undivided moiety in them; in which case, the vendee will be tenant in common with the other partner (a).

If there be two or more defendants, and one of them die after final judgment, and before execution executed, the writ should in form be against all, but it can be executed on the goods of the survivors only (b); or, upon suggesting the death upon the roll, the writ may be against the survivors alone (c).

As to execution, after the death of a sole plaintiff or defendant, *see ante*, 377, *post*, Vol. 2, 879.

As to execution upon the goods of an ambassador or his servant, *Sec. see ante*, 66.

No goods or chattels, being in or upon any messuage, lands, &c., which are leased for life, term of years, at will, or otherwise, shall be liable to be taken in execution, unless the party at whose suit the writ of execution is sued out shall, before the removal of such goods, pay unto the landlord (d) of the said premises all the rent due for the same (e), not exceeding one year's rent; and the sheriff shall thereupon proceed to levy as well the money so paid for rent, as the execution money. (8 A. c. 14, s. 1). Provided that nothing in this act shall be construed to extend to the levying or recovering of any debts, &c. due to the king. (*Id.* s. 8). According to this statute the sheriff is not bound to take the goods in execution, unless the plaintiff in the action, before the removal of such goods, pays the landlord the rent due to the extent of one year's arrears at the time of the levy (f). If the sheriff remove any part of the goods without the rent due is thus paid, he will be liable (g). The landlord's remedy against the sheriff, under this act, is either by special action on the case (h), or by motion to the Court. If the landlord moves the Court, they might stay the proceedings, on the sheriff paying over the proceeds of the sale, which they would not do if the landlord brought an action (i). Formerly it was holden, that, to entitle the landlord to either remedy, he must have made a demand and given notice to the sheriff of the rent due, before the goods were removed (j): but this has since been

(z) *Groves v. Courham*, 10 Bing. 5.

(a) *Eddie v. Davidson*, 2 Doug. 650, Comyns, 217; *Meydon v. Heyden*, 1 Salk. 392; and see *Morley v. Stromborn*, 3 B. & P. 254, 288, Tidd, 9th ed. 1807.

(b) 2 Saund. 50 a, 72 k, n.

(c) *Withers v. Harris*, 2 Ld. Raym. 804, *post*, Vol. 2, 871, 879.

(d) See *Collyer v. Speer*, 4 Moore, 473, 2 B. & B. 67, 8 C.

(e) See *Saunders v. Musgrave*, 6 B. & C. 524. See *Hodson v. Gascoigne*, 5 B. & Ald. 88.

(f) *Calvert v. Jolliffe*, 2 B. & Adol. 418; and see *Wray v. Earl of Eglmont*, 1 N. & M. 190, 4 B. & Adol. 125, 8 C.

(g) *Collyer v. Speer*, 4 Moore, 473, 2 B. & B. 67, 8 C.; *Calvert v. Jolliffe*, 2 B. & Adol. 418.

(h) *Green v. Austin*, 3 Camp. 200; *Duck v. Braddyll*, M'Clel. 217, 15 Price, 455, 8 C.; *Rothway v. Wood*, 3 Camp. 34.

(i) *Foster v. Hilton*, 1 Dowl. P. C. 38; *Henchett v. Kimpton*, 2 Wils. 141.

(j) *Waring v. Duxberry*, 1 Str. 97.

decided otherwise; and a notice to the sheriff, even after the removal of the goods, provided it be before he has actually paid over the money, will be sufficient to ground a motion to the Court (*k*): and, in the case of an action, it is not necessary to prove even a notice; if it can be shewn that the sheriff or his officer knew, previously to the removal of the goods, that there was rent due to the landlord, it will be sufficient (*l*). A bill of sale by the sheriff is deemed a removal of the goods within the meaning of the act (*m*); but, unless there be such bill of sale or removal, as, if the defendant pay the debt before the goods are sold, or the like, the landlord has no claim upon the sheriff (*n*). So, if there be any irregularity in the execution of the writ, so as to render it void (*o*), or if the landlord accept the undertaking of a third person for the rent, although it should afterwards turn out to be void (*p*), the sheriff is not liable to the landlord. So, if two years' rent be due, and one year's rent be paid under one execution, the landlord cannot claim the second year's rent under a second execution (*q*). Nor can the landlord claim for more rent than was due at the time the goods were first taken possession of under the writ (*r*). And where growing corn is taken in execution, and the landlord is paid a year's rent out of it, he cannot afterwards distrain the same corn for rent subsequently accruing due (*s*). The statute also must be understood as extending only to the immediate landlord; and therefore it has been holden that a ground landlord has no claim for his rent, under an execution against the under-lessee (*t*). Where the sheriff has seized under a *fi. fa.* and afterwards receives notice before sale of the landlord's claim for rent in arrear, and afterwards a fiat of bankruptcy issues, the assignees are entitled to the goods, unless the landlord has made a distress for rent (*u*). The landlord is not obliged to pay the sheriff poundage on the amount of the rent levied by him (*v*).

The king's taxes due at the time of the seizure to the extent of one year's arrears, must be paid by the sheriff to the collector. (43 *G.* 3, c. 99, s. 37).

Besides the amount of the debt, the sheriff also levies his poundage and expenses, as mentioned *ante*, 386. If any surplus remain, the sheriff is not bound to search for the defendant in order to pay it to him, but he may retain it in his hands until it be demanded (*w*).

The sale or assignment by the sheriff of the goods or chattels of the defendant taken on a *fi. fa.*, conveys an indefeasible title to a *bona fide* vendee; so much so, that, if the writ be afterwards vacated, the defendant shall not be restored to his goods (*x*). But, if the writ were void, as issuing from a court not having jurisdiction, or if the goods were the goods of a stranger and not of the defendant, the sale of the sheriff would convey no property (*y*).

(k) MS. H. 1820; *Arnott v. Gurnett*, 3 B. & Ald. 440.

(l) MS. T. 1820; *Clerk v. Ditch*, 3 B. & Ald. 645.

(m) *West v. Hodges*, Barnes, 211. See *Smith v. Russell*, 3 Taunt. 400.

(n) 1 Selion, 433.

(o) Barnes, 122.

(p) *Rotheray v. Wood*, 3 Camp. 24.

(q) *Dud v. Burd*, 2 Str. 1024.

(r) *Hobbs v. Knight*, 1 M. & Sel. 43; and see *Knight v. Birch*, 3 Camp.

521.

(s) *Pittcock v. Purvis*, 2 B. & B. 362.

(t) *Bonnet's case*, 2 Str. 787.

(u) *Gothin v. White*, 6 Leg. Obs. 236.

(v) *Gore v. Gaston*, 1 Str. 643.

(w) Noy, 69.

(x) *Doe v. Thorn*, 1 M. & Sel. 435, Dyce, 363, pl. 24; 5 Rep. 99 b, 1 Ves. 195; *Doe v. Maries*, 6 M. & Sel. 110. See form of bill of sale, Chit. Forms, 280.

(y) *Wats. Shff.* 189.

A bond to the sheriff conditioned to pay the money into Court at the return of the *fi. fa.* (u), or to indemnify the sheriff from any proceedings for his return to the writ, though a false return (w), or for any irregularity in executing it (x), is valid; notwithstanding the stat. 23 H. 6, c. 9, relative to bonds to sheriffs.

The defendant, instead of allowing the writ to be executed on his goods, may pay the debt and costs, &c. to the officer; and this will be deemed a good payment to the plaintiff (y); and the sheriff's duty on a *fi. fa.* in this respect differs from his duty on a *ca. sa.* If the sheriff seize or sell the goods after a tender of the debt and costs, he would, it seems, be a trespasser (z).

*From what time it binds defendant's property, and priority of writs.*] As to this see *ante*, 379.

*When and how returned.*] We have already noticed (*ante*, 383) when and how the sheriff may be compelled to return the writ of execution in general, and how the return is to be made. The execution may be good, although the writ be not returned (a); and it is a sufficient justification to the sheriff in an action of trespass for taking the defendant's goods, to plead that he took them by virtue of the *fi. fa.*, without shewing it returned (b); therefore, it is not usual for the sheriff to return writs of *fi. fa.*, unless ruled to do so. (*See ante*, 383). Where a *fi. fa.* is sued out merely to warrant a *testatum* writ, the attorney may return it (c); although in practice it is usual to take it to the sheriff's office for that purpose.

As to how the sheriff should act in the case of adverse claims, see *post*, Vol. 2, Book 4, Part 1, Chap. 11.

The sheriff should make a true return; if the return be untrue, the plaintiff may maintain an action against him for his false return (d). In such action the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of fraud (e). As to how far the return is conclusive between the parties, or on the sheriff, see *ante*, 385. If the defendant has no goods in the sheriff's bailiwick, or the sheriff has not been informed that he has any, he should return *nulla bona* (f). If he has seized and sold goods to the amount of the sum to be levied, he must return that he has levied, and that he has the money ready, &c. (g). If the goods sold are not sufficient to satisfy the whole sum to be levied, he should return *feri feci* as to so much, and *nulla bona* as to the residue (h). If he has taken goods but cannot sell them, he should return that fact, and

(u) *Beaufort's case*, 10 Co. 99 b.

(w) 1 Saund. 161 n. See form of bond, Chit Forms.

(x) *Rogers v. Reeves*, 1 T. R. 421.

(y) *Taylor v. Belkon*, 2 Lev. 203, T. Jon. 97, S. C.; *Swindon v. Lyttal*, 5 Mod. 290; Cro. El. 304.

(z) See *Lefaus v. Moregreen*, 1 Keb. 655.

(a) 4 Co. 64, *ante*, 383.

(b) *Chewsey v. Barnes*, 10 East, 73.

(c) *Palmet v. Prier*, 2 Salk. 590.

(d) *Wordall v. Smith*, 1 Camp. 332; *Dale v. Birch*, 3 Id. 347.

(e) *Tyler v. Duke of Leeds*, 2 Stark. Rep. 218.

(f) See form, Chit. Forms.

(g) Id.

(h) Id.; and see *Willett v. Sparrow*, 6 Taunt. 576, 2 Marsh. 233, S. C.

that the goods remain in his hands for want of buyers. See further as to this return, and the writ of *venditioni exponas*, *infra*. When the defendant has goods, but the plaintiff is prevented from taking them, by the allowance of a writ of error, he should not return *nulla bona*, but should return the fact of a writ of error having been sued out and allowed, as a cause for not levying them (h). He cannot return a rescue. (*Ante*, 384). As to his return of *mandavi ballivo*, see *ante*, 384. As to his return to a *fi. fa.* against an executor, see *post*, Vol. 2, Book 3, Part 2, Chap. 5, s. 2; to a *fi. fa.* against a clergyman, see *post*, Vol. 2, Book 3, Part 2, Chap. 13.

*Poundage and Expenses.*] As to these, see *ante*, 385, 386.

*What writs may issue after it, &c.*] If *nulla bona* be returned, the party may sue out an *alias*, &c. or *testatum*, as mentioned *ante*, 375, 376. Or, if the sheriff have levied part of the debt, the plaintiff, upon the writ being returned, may sue out a *feri facias* for the residue (i). When the sheriff levies only part, you must get the writ returned (by ruling or obtaining a Judge's order on the sheriff to do so, if he will not do it voluntarily), before you can sue out any writ for the residue; because the second writ recites the first, and the sheriff's return to it. (*Ante*, 376).

If the sheriff return that he has taken goods, but that they remain on his hands for want of buyers, you must then sue out a writ of *venditioni exponas*, in order to compel a sale of the goods (j). Engross it on a plain piece of parchment; get it sealed, pay 7d. Then leave it at the sheriff's office, to be returned. If goods to the amount of part of the debt only be seized under the *feri facias*, and the above return be made, the plaintiff may have a *venditioni exponas* for that part, and a *fi. fa.* for the residue, in one writ (k). And it is in general prudent to sue out this writ without delay; for, where the sheriff made his return to the *fi. fa.* in Michaelmas term, and the plaintiff did not sue out the *venditioni exponas* until the Trinity term following, and in the mean time the goods were seized under an extent, the Court held that the sheriff was not compellable to make good the loss, although the delay was occasioned by indulgence given to the defendant, by the advice and with the concurrence of the sheriff's officer (l). If an act of bankruptcy of the defendant was committed prior to the seizure on the *fi. fa.*, the sheriff is not concluded by his return of the goods remaining in his hands for want of buyers (m). After the delivery of the *venditioni exponas* to the sheriff, he is bound to sell the goods, and have the money in Court on the return day of the writ (n); and he cannot a second time return that the goods remain in his hands

(h) *Cleghorn v. Deane*, 3 Moore, 23, Gow, 68, S. C. See a form, Chit. Forms.

(i) See the references to the forms Chit. Forms, Index, *Fieri Facias*.

(j) See the form, Chit. Forms, 268; and of *venditioni exponas* to a county palatine, *Id.* 372.

(k) See the form, Chit. Forms.

(l) *Ruston v. Hatfield*, 3 B. & Ald. 204, 1 Chit. Rep. 613, S. C.; *Clutterbuck v. Jones*, 18 East, 78.

(m) *Brydges v. Walford*, 6 M. & S. 42, *ante*, 385.

(n) *Cameron v. Reynolds*, Cowp. 460.

for want of buyers; although, if he do make such a return, the Court will not on that account grant an attachment against him (o). But the proper way of proceeding, if the sheriff do not sell and pay over the money on or before the return of the *venditioni*, is to sue out a *distringas* against him, directed to the coroner; and if he do not sell the goods, and pay over the money, before the return of that writ, he shall forfeit issues to the amount of the debt (p). If there has been *laches* on the part of the plaintiff, or collusion between him and the officer, the Court will not grant the *distringas* (q). In making sale of goods under a *venditioni exponas*, the sheriff is not bound by the value set upon the goods in his return to the *fi. fa.* (r); but otherwise, if they be rescued from him, or the like, so that he cannot make sale of them (s).

Where a sheriff goes out of office, after returning that he has levied, but that the goods remain in his hands for want of buyers, instead of suing out a *venditioni exponas*, the plaintiff may sue out a *distringas nuper vicecomitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods (t). Or if only a part of the goods were seized under the first writ, the plaintiff may have a *distringas* for that part, and a *fi. fa.* for the residue, in one writ (u). The former sheriff must thereupon sell the goods and pay over the money, otherwise he will forfeit issues to the amount of the debt (v). Where on the *distringas* the new sheriff returned that he had distrained issues to the value of 40s., and in consequence of the delay further costs had been incurred, the Court increased the issues to 100*l.* to meet the costs incurred (w).

After *nulla bona* returned to a *fi. fa.* the plaintiff may sue out an *elegit*. So, if *fieri feci* be returned as to part, the plaintiff may sue out an *elegit* for the residue (x).

After *nulla bona* returned to a *fi. fa.*, the plaintiff may sue out a *ca. sa.* in all cases where a *ca. sa.* can be adopted in the first instance. So, if *fieri feci* be returned as to part, the plaintiff may sue out a *ca. sa.* for the residue (y).

[How far a discharge of judgment.] If the sheriff has taken goods to the amount of the sum to be levied, the defendant is discharged from the judgment and all further execution, although the sheriff does not satisfy the plaintiff (z); or, as we have already seen, *ante*, 376, if the sheriff has levied any goods to the amount of part of the debt, no further execution can issue until the writ of *fi. fa.* is returned. But one defendant is not discharged by a mere seizure of the goods of a co-defendant; for it is no satisfaction (a).

(o) *Leader v. Dunvers*, 1 B. & P. 353.

(p) 2 Saund. 47 n.

(q) *Ruston v. Hatfield*, *supra*, n. (l).

(r) *Charter v. Preter*, Cro. El. 598;

*Sly v. Finch*, Cro. Jac. 515; Godb. 276; but see 2 Show. 89.

(s) *Clerk v. Withers*, 2 Ld. Raym. 1075. See *ante*, 391.

(t) *Clerk v. Withers*, 6 Mod. 290; 2 Saund. 471; and see 13 East, 78. See the form, Chit. Forms.

(u) See the form, Chit. Forms.

(v) *Clerk v. Withers*, 6 Mod. 296.

(w) *Philips v. Morgan*, 4 B. & Ald. 652.

(x) See the form, Chit. Forms; and of the entry on the roll, *Id.*

(y) See the form, Chit. Forms.

(z) *Sly v. Finch*, 2 Hbll. Rep. 37, Cro. Jac. 514, S. C.

(a) *Dyke v. Mercer*, 2 Show. 394.



*Remedy for the amount levied.*] As soon as the sheriff seizes goods, &c., under a writ of execution, the defendant is thereby absolutely discharged to the extent of the levy, whether the sheriff ever sell the goods or return the writ, or not (*h*), or even although they afterwards be rescued from him (*c*); and he may plead this to a *scire facias*; or, if another writ be sued out against him for the same debt, he may be relieved by *audita querela* (*d*), or upon motion. But if two be jointly and severally bound by a bond or otherwise, and an action is brought and execution issued against one of them, and his goods be seized but not sold, this will not discharge the other obligor, because it is no actual satisfaction (*e*). Immediately upon the seizure, the sheriff acquires such a special property in the goods, that he may maintain trover or trespass against any person who takes them (*f*). The sheriff is consequently liable to the plaintiff for the amount of the levy; and it may be recovered from him either by application to the court (*g*), or by action of debt, account, or assumpsit (*h*), to which action it seems the statute of limitations cannot be pleaded (*i*). But, if the action be brought before the money has been demanded of the sheriff, the court, upon application of the sheriff, will stay the proceedings, upon payment of the money levied, without costs (*k*). And it seems such action ought not to be brought before the return of the writ (*l*). In such action the sheriff may deduct his poundage (*m*). An action on the case does not lie against the sheriff (who has not been ruled to return the writ) for neglecting to have the money in court according to the exigency of the *fi. fa.* (*n*). Where the plaintiff had appointed a special bailiff to manage the sale of goods under a *fi. fa.*, it was held the sheriff was discharged (*o*).

*Contribution.*] As to this, see *ante*, 388.

*Irregular execution.*] As to this, see *ante*, 388.

*Restitution.*] As to this, see *ante*, 388.

### 3. Elegit.

*What, and form of.*] By stat. *Westm.* 2 (13 Ed. 1), c. 18, "where a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him that sueth, to have a *fi. facias* to the sheriff to levy the debt upon the lands and chattels of the debtor, or that the sheriff shall deliver to him all the chat-

(b) *Taylor v. Baker*, 2 Mod. 214; 2 Bac. Abr. Execution, (D).

(c) 2 Saund. 343.

(d) W. Jon. 430; Ro. Abr. 598, 921.

(e) 2 Ld. Raym. 1072.

(f) 2 Saund. 47; *Wilbraham v. Snow*, 1 Sid. 438.

(g) Tidd, 9th ed. 1019.

(h) W. Jon. 430; Ro. Abr. 598, 921; *Cockram v. Welbye*, 2 Show. 79, 2 Mod. 212, S. C.; *Spence v. Richards*, 2 Show. 281, Hob. 286, S. C.; and see *Dale v. Birch*, 3 Camp. 347.

(i) *Cockram v. Welbye*, 2 Show. 79; 2 Bac. Abr. Execution, (D).

(k) *Jefferies v. Sheppard*, 3 B. & Ald. 696.

(l) *Per Parker, J.*; see *Morland v. Pellatt*, 8 B. & C. res. 727.

(m) *Longvill v. Jones*, 1 Stark. 346.

(n) *Morland v. Leigh*, 1 Stark. Rep. 388.

(o) *Pallister v. Pallister*, Tidd, 9th ed. 1019; 1 Chit. Rep. 614, n.; *Higgins v. M'Adam*, 3 Y. & J. 14.

tels of the debtor (saving his oxen and beasts of his plough), and the one-half of the land, until the debt be levied, upon a reasonable price or extent." From the election given to the plaintiff by this statute, and from the entry of the award of this execution on the roll, "*quod elegit sibi executionem*," &c., the writ of *elegit* derives its name (p). It may be sued out against the defendant, or, after his death, against his heir and terretenants.

As to the direction, *teste*, and return of this writ, see *ante*, 378. The writ, like other writs of execution, must strictly pursue the judgment, and be warranted by it, see *ante*, 376, and the instances there.

The plaintiff may award upon the roll writs of *elegit* for the whole debt, into as many different counties as he pleases, without being under the necessity of suing out *testatum* writs of *elegit*, and may execute all or any of them at his pleasure (q).

*When to be sued out.*] As to this in general, see *ante*, 374. It seems that this writ may be sued out even after a year from the signing of the judgment, without a *scire facias*, by awarding an *elegit* on the roll as of a previous term, and continuing it by *ricconis non misit breve*, to the term of which the *elegit* is tested (r); but this seems questionable; and it is safest to sue out the *elegit* within the year; and if not intended to be then executed, let it be returned and filed within the year, as in other cases of writs of execution, and afterwards continued down on the roll, to the term of which the *elegit*, intended to be executed, bears *teste*. (See *ante*, 374). Or if the year have elapsed, without any writ of execution being sued out, you may revive the judgment by *scire facias* (see Vol. 2, Book 3, Part 1, Chap. 3), and then sue out an *elegit*.

*How sued out and indorsed.*] Engross the writ on a plain piece of parchment; get it sealed, pay 7d.; or, for a non omittas, 1s. 2d. It need not be signed. At the time you get the writ sealed, you must produce to the sealer of the writs the postea, judgment-paper, or inquisition. (R. H. 2 W. 4, r. 75; R. H. 2 & 3 G. 4). Indorse it to levy the debt, &c., as directed *ante*, 390; indorse on it also the defendant's addition and place of abode, or such other description of him as you are enabled to give (R. H. 2 & 3 G. 4) (s), and deliver it to the sheriff or officer to execute.

*When, where, and how executed.*] As to when and where writs of execution may in general be executed, see *ante*, 380, 381; as to how far doors may be broken open, see *ante*, 381; as to the necessity for producing the warrant, see *ante*, 382.

(p) See forms of the writ, Chit. Forms.

(q) See the form of this award upon the roll, Chit. Forms.

(r) See *Seymour v. Greenhill*, Carth. 283; Tidd, 1104.

(s) See *Clarke v. Palmer*, 9 B. & Cres. 153.

Upon the receipt of the *elegit*, the sheriff must impanel a jury, who are to inquire of all the goods and chattels of the debtor, and appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition had, the sheriff is to deliver all the goods and chattels (excepting beasts of the plough) and a moiety of the lands, to the plaintiff, and must return the writ, in order that the inquisition may be recorded in the Court out of which the *elegit* issued (*u*). The inquisition must find the lands, with certainty; the place and county where they lie, and where the inquisition is taken (*x*); the estate the defendant has in them (*y*); whether seised in severalty, or as joint tenant, or tenant in common (*z*); and their value (*a*). If there be no lands, the sheriff need not return the inquisition (*b*).

If the goods be sufficient to satisfy the judgment, the sheriff must not extend the lands (*c*), but merely deliver the goods to the plaintiff, at the value set upon them by the jury. But if the goods alone be insufficient, a moiety of the lands, after being valued by the jury, must be set out by the sheriff by metes and bounds, and delivered to the plaintiff (*d*). If he deliver more or less than a moiety (*e*), or do not set it out by metes and bounds (*f*), the execution will be void. He is not bound, however, to set out a moiety of each particular tenement or farm; but only certain tenements, &c., making in value a moiety of the whole (*g*). If two persons have judgment against a defendant, and one of them have a moiety of the defendant's lands delivered to him upon an *elegit*, the other, upon suing out an *elegit* afterwards, can only have a moiety of the moiety which remained to the defendant (*h*); and if more than a moiety of the residue be extended under the second writ, the inquisition will be void (*i*). But if one person have the two judgments, and sue out two *elegits* during the same term; on one *elegit* he shall have a moiety of the defendant's lands, and the entire of the other moiety on the other *elegit*, and not merely a moiety of a moiety (*k*). The sheriff delivers only legal possession of the lands; the actual possession must be obtained in an action of ejectment (*l*).

A term of years may either be extended, that is, a moiety thereof may be delivered to the plaintiff at an extended annual value, as part of the lands of the defendant; or the entire of it may be delivered to the plaintiff, as part of the defendant's chattel property, the jury

(*u*) 2 Bac. Abr. Execution, (C. 2); Co. Lit. 383. b.; 2 Inst. 396; Dy. 100; 5 Co. 74 a b; ante, 383.

(*v*) Dy. 304.

(*w*) See Moore, 8.

(*x*) Hut. 16; Brownl. 38.

(*y*) Sparrow v. Matternack, Cro. Car. 319.

(*z*) Stonehouse v. Ewen, 2 Str. 174. See post, 406.

(*a*) 2 Inst. 395.

(*b*) Sparrow v. Matternack, Cro. Car. 319.

(*c*) Berry v. Wheeler, 1 Sid. 91, 239; Puttin v. Purbeck, 2 Salk. 563, 2 Ld. Raym. 718, S. C.

(*d*) Pullen v. Birkbeck, Carth. 453; Furray v. Durrant, 1 B. & Ald. 40.

(*e*) Den v. Abington, Earl of, Doug. 473.

(*f*) Huit v. Cogan, Cro. El. 423.

(*g*) Morris v. Jones, 3 D. & R. 603, 2 B. & C. 232, S. C.

(*h*) Harl. 23.

(*i*) Brown v. Rivers, 5 Doug. 473, 3 Keb. 243; Taylor v. Cole, 3 T. R. 295.

having first appraised it at a gross sum (*m*). But, even in the latter case, the defendant may, if he wish it, save the term, by tendering the sum at which it has been appraised, at any time before delivery, or, it is said, even afterwards by a tender in Court (*n*); if delivered to the plaintiff, after such tender made, the defendant may be relieved by *audita querelâ*, or by application to the Court. Whether extended as lands, or appraised and delivered as chattels, the inquisition, in both cases, but particularly in the former, should find the commencement and duration of the term with certainty (*o*).

The sheriff may extend, under an *elegit*, lands in ancient demesne (*p*), or rent charges (*q*), or estates held in trust for the defendant. (29 C. 2, c. 3, s. 10). But copyholds cannot be extended (*r*); nor even a term for years of copyhold lands, made by licence of the lords (*s*); not a mere rent seek (*t*); nor, it seems, an advowson in gross (*u*); nor the glebe of a parsonage or vicarage, nor a churchyard (*x*); although it is said that the lands of a bishop may be extended (*y*). The sheriff, however, cannot extend, under an *elegit*, any tenement which cannot be granted over; such as the office of filacer (*z*), or the like. But, if the sheriff extend lands, &c. not extendible by law, and also extend lands which are extendible, the inquisition may be good as to the latter, though bad as to the former (*a*).

If judgment be obtained against two, and one of them die before execution, the judgment survives as to the personalty, but not as to the realty; that is, the judgment binds the goods of the survivor only, but it binds the lands both of the survivor and of the deceased. Therefore, if you intend to proceed in the personalty, you must have your *fi. fa.* executed upon the goods of the survivor alone, as mentioned *ante*, 397; but, if in the realty, then, after a *scire facias* against the survivor, and the heir and terretenants of the deceased, the plaintiff may sue out an *elegit* against them (for he cannot proceed in the realty against the survivor alone), and thereupon extend the lands of the deceased as well as those of the survivor (*b*). But it is said, that, if all the defendants die, and one leave lands and the others not, the plaintiff may sue out an *elegit* against the heir and terretenants of him who left the lands, alone.

Although the statute says that the plaintiff shall hold the lands "as his freehold," yet the tenant by *elegit* has not a freehold, but a chattel interest only, which goes to his executors (*c*). The plaintiff

(*m*) 2 Inst. 308; 8 Co. 171; Dalt. 137.

(*n*) 2 Saund. 68 c.

(*o*) Id; *Pulmer v. Humphrey*, Cro. El. 584; 4 Co. 74; Gilb. Execution, 35.

(*p*) *Cox v. Barnaby*, Hob. 47, Moore, 211, Brownl. 234, 4 Inst. 270, 2 Inst. 397.

(*q*) *Martin v. Wilks*, Moore, 32.

(*r*) *Morris v. Jones*, 3 D. & R. 603, 2 B. & C. 232, S. C., 3 Co. 9, Co. Copyh. 149, 1 Ro. Abr. 888.

(*s*) 1 Ro. Abr. 888.

(*t*) *Walsall v. Heath*, Cro. El. 656, 3 Co. 9.

(*u*) Gilb. Execution, 39; but see 3 P. Wms. 401.

(*x*) Gilb. Execution, 40; Jenk. 207.

(*y*) Dalt. 136.

(*z*) Dy. 7.

(*a*) *Morris v. Jones*, 3 D. & R. 603, 2 B. & Cren. 242, S. C.

(*b*) 2 Saund. 51 a, (n. 4).

(*c*) Co. Lit. 42, 43; 2 Inst. 398, 2 Bl. Com. 161.

may enter and take possession under the *elegit*; but, if he cannot do so without force, then he had better proceed by ejectment.

If tenant by *elegit* be evicted before the debt be wholly levied, he shall recover it again by writ of *novel disseisin*, and after that by writ of *redisseisin*, if need be (*stat. Westm. 2, (13 Ed. 1), c. 18*); or by ejectment; or he may have a *scire facias* and re-extent, by *stat. 32 H. 8, c. 5 (d)*.

*From what time it binds defendant's property, and priority of writs.]* As to this see *ante*, 379.

*When and how returned.]* We have already noticed, *ante*, 383, when and how the sheriff may be compelled to return the writ, and how the return is to be made. Unlike other writs, we have seen that an *elegit* must in all cases be returned. (*Ante*, 383). If lands have been extended under it, the inquisition must also be returned and filed, otherwise not (*e*); but where chattels have been appraised and delivered to the plaintiff, the sheriff should return to the writ, that he delivered the goods at a reasonable price fixed by the jury (*f*). If any objection be intended to be made to the inquisition, for matter extrinsic, it must be made before the inquisition is filed (*g*).

*Poundage and expenses.]* As to these see *ante*, 385, 386.

*What writs may issue after it.]* If no land be extended upon an *elegit*, the plaintiff may, of course, have an *elegit* into another county (*h*); or even if lands be extended upon the first *elegit*, the plaintiff, on a suggestion that the defendant has more lands either in the same or in another county, may have another *elegit* directed to the sheriff of such county (*i*). But where land is extended upon an *elegit*, no other writ of execution but an *elegit* can be sued out against the defendant's person or property, unless the plaintiff be evicted from the lands extended (*k*).

But if the *elegit* be ineffective, as, if the sheriff return that he has taken an inquisition of the lands, but could not deliver a moiety thereof, because they were already extended, the plaintiff may then have execution by *ca. sa.* or *fi. facias* (*l*). Or, if the inquisition be avoided for matter intrinsic, the plaintiff shall have a new writ of *elegit*, or a *ca. sa.* or *fi. fa.*, at his option. Or, if it be void for mat-

(d) See Co. Lit. 289. b., 290. a.; 4 Co. 66 a.; Cro. Jac. 338; and see 4 G. 1, c. 25, s. 4.

(e) *Stonehouse v. Eiren*, 2 Str. 674.

(f) Dy. 100 a., pl. 71; and in marg. See forms of the return and inquisition, Chit. Forms: of the award of the *elegit* upon the roll, and entry of return and inquisition thereon, Id.

(g) 2 Inst. 306; 2 Ch. Ca. 183; but see *Anon.* 1 Vent. 259.

(h) See form of writ, Chit. Forms.

(i) *Foster v. Jackson*, Hob. 57; Ro. Abr. 404; *Hunger v. Frey*, Moore, 341, Sty. 454, 455; and see the form of the writ, Chit. Forms: and of the award thereof upon the roll, Id.

(k) Bro. Abr. *Elegit*, 15; 1 Ro. Abr. 806; *Anon.* Hob. 2; *Foster v. Jackson*, Id. 58, 2 Bulst. 97, 5 Co. 87; *Crawley v. Lidgent*, Cro. Jac. 338.

(l) Ro. Abr. 905.

ter appearing upon the face of it, then, as the plaintiff can never obtain actual possession of the land under it, he should get the Court to vacate the writ and award another; which may be done either upon a suggestion of the matter, or upon *scire facias* (m). So, if the sheriff return *nihil* to an *elegit*, the plaintiff may have execution by *fi. fa.* or *ca. sa.* (n), or he may sue out another *elegit* (o). Or, if the sheriff return that he has levied upon the goods for part, and return *nihil* as to the lands, the plaintiff may have execution for the residue, either by *ca. sa.* or *feri facias* (p); or by another *elegit* (q); or he may have an action of debt on the judgment (r). So, although an *elegit* be awarded on the roll, yet if no writ in fact issue (s), or if it have issued, but nothing be done or returned on it (t), the plaintiff is not thereby precluded from having execution by *ca. sa.* or *feri facias*, if he wish it.

In most cases, it is more advisable to sue out a *fi. fa.* against the debtor's goods in the first instance; and, if they are not sufficient to satisfy the debt, then to sue out an *elegit* against his land (u).

*How the defendant shall recover back his land.*] As soon as the plaintiff shall have fully satisfied his judgment out of the extended value of the land, the defendant may recover back his lands from him, either by an action of ejectment, or by a *sci. fa. ad rehabendam terram*. Or, before he has so satisfied his judgment, the defendant, upon tendering to him in Court whatever may be deficient of the amount of the judgment, may recover his lands by a *scire facias ad rehabendam terram*. Formerly, the most usual, and generally the most advisable mode for the recovery of the lands from the plaintiff, was by bill in equity; but the Court will now, upon application, refer it to the master to ascertain the amount of the rents and profits received, and order that if it appear that the debt, &c., is satisfied, possession shall be delivered to the defendant (r). If the lands be recovered back by ejectment, or *sci. fa.*, the plaintiff will not be entitled to interest on his judgment; but, on the other hand, he will have to account only for the extended value of the land, which is usually very much below the real value. But, if the lands be recovered back by a suit in equity, the plaintiff will be allowed interest on his judgment; but, on the other hand, he will be obliged to account, not for the extended value merely, but for the actual profits of the land while in his possession (y).

(m) See Townsend, Judgm. 129, 130; 2 Saund. 68 c; 16 & 17 C. 2, c. 5, s. 2; 8 G. 1, c. 25, s. 4. See form of entry of quashing the inquisition for defects in it, and awarding a new writ, Chit. Forms.

(n) Knowles v. Palmer, Cro. El. 160.

(o) Anon. Hob. 2; Cro. Jac. 339; 2 Saund. 68 c.

(p) Bevon v. Perck, 1 Str. 226; Lancaster v. Fidler, 2 Ld. Raym. 1451; Foster v. Jackson, Hob. 50.

(q) Glascock v. Morgan, 1 Lev. 92, 1 Sid. 184, S. C.

(r) Id.

(s) See 2 Saund. 68 c.

(t) Cooper v. Langworth, Moore, 545.

(u) 2 Saund. (3) (n).

(x) Price v. Varney, 5 D. & R. 612, 3 B. & C. 733, S. C.

(y) Godfrey v. Watson, 3 Atk. 517, Amb. 320, 2 Ves. 549; Lewis v. Morgan, 3 Y. & J. 394.

4. *Levari facias.*

The *levam facias* commands the sheriff to levy or make of the lands and chattels of the defendant the sum recovered by the judgment (z). The sheriff, however, is not thereby authorized to sell or extend the lands, or deliver them to the creditor; but must collect the debt from the issues and profits of the land, and from the sale of the chattels. He may therefore collect the rents from the tenants, cut down corn and other crops growing upon that part of the land in the debtor's possession (a), may seize and sell all the defendant's goods and chattels, and all the beasts (even those of a stranger) (b) he may find levant and couchant upon the land (c).

Excepting in the case of outlawry (d), however, this writ has been completely superseded in practice by the writ of *elegit*; and it would be useless, therefore, to treat further of it in this place.

5. *Capias ad satisfaciendum.*

[What, and when it lies.] This writ commands the sheriff to take the body of the defendant, and him safely keep, so that he may have his body in Court on the return day, to satisfy the plaintiff. It may be considered as a general rule that this writ will lie in all cases where a writ of *capias* might have been used as the process to bring the defendant before the Court. And it makes no difference in this respect, whether the defendant were, or could have been, holden to bail in the action or not, with the exception of a few cases which shall presently be noticed. Therefore, bail may be taken in execution upon a *ca. sa.* (e), although they could not be holden to bail. (*Aut.*, 70). So an infant (f), or *feme covert*, may be taken on a *ca. sa.*; and if a *ca. sa.* be sued out against husband and wife, the wife may be taken on it; and the Court will not discharge her (g), unless she has no separate property out of which the demand can be satisfied, or where there appears to be collusion between the husband and the plaintiff to keep her in custody (h); the general rule being that the wife shall be discharged, if in custody, before execution, but not after it (i).

An attorney, or officer of the Court, though he could not be ar-

(c) See the form of the writ, 10 Went. 340, Tidd's Forms.

(a) Godb. 290, Plowd. 441 a; Finch, 101; Comb. 470; 2 Inst. 453.

(b) *Britton v. Cole*, 1 Salk. 395, 1 Ld. Raym. 305, S. C.

(c) 2 Saund. 68, (n. 1).

(d) See Vol. 2. Book 4. Part 1, Chap. 2.

(e) *Goodchild v. Chauvorth*, 2 Str. 822, 1138.

(f) *Gardiner v. Holt*, 2 Str. 1217.

(g) *Roberts v. Andrews*, 3 Wils. 124, 2 W. Bl. 720, S. C.; *Finch v. Dublin*, 2 Str. 1237; *Langstaff v. Rain*, 1 Wils.

149; *Herriman v. Gilbert*, Barnes, 203.

(h) *Sparkes v. Bell*, 8 B. & Cres. 1, 2 M. & R. 124, S. C.; *Pitts v. Miller*, 2 Str. 1167.

(i) *Roberts v. Andrews*, 3 Wils. 124, 2 W. Bl. 720, S. C. Where a married woman was sued as a *feme sole*, and suffered judgment by default, and was taken in execution, the Court refused to discharge her out of custody, and left her to her writ of error, saying, that she ought not to have suffered the plaintiff to have incurred the expense of a writ of inquiry. *Moses v. Richardson*, 8 B. & Cres. 421.

rested originally in the action, may be so on a *capias ad satisfaciendum*.

A *ca. sa.* does not lie in actions against any member of the royal family, nor in actions against peers or peeresses, or against members of the House of Commons during their time of privilege, or against corporations or hundredors. (*See ante*, 65, 66, 73). Where judgment of *respondeas ouster* was given on a plea of peerage, and a verdict having been afterwards obtained for the plaintiff, the Court refused to set aside, on an affidavit of peerage, a writ of *ca. sa.* issued against the defendant (*j*). Also it lies not against ambassadors or their servants; (7 *A. c.* 13, *s.* 3; and *see ante*, 66); nor against seamen or soldiers in his Majesty's service, unless in actions for a debt of 20*l.* or upwards, contracted previously to their entering the service; (*see ante*, 73); nor against bankrupts who have obtained their certificates, for any debt which might have been proved under their commission, and, if arrested, they shall be discharged upon application to a Judge at chambers, on production of their certificate; (6 *G.* 4, *c.* 16, *s.* 126) (*k*); nor against executors or administrators for the debts of their testator or intestate, unless a *devastavit* have been returned (*l*); or against an heir for a debt to be levied on the lands descended (*m*); nor against the servants in ordinary or menial servants of the king, or of a queen regnant, unless leave have previously been obtained of the lord chamberlain of the king's household (*n*).

If a *ca. sa.* be sued out and executed in a case where it does not lie, the Court upon motion will discharge the defendant. It is not advisable for the sheriff to discharge a bankrupt or other person privileged from arrest, when arrested on a *ca. sa.*, unless he be a member of the royal family, or a member of parliament, or an ambassador or his servant, for he does it at his own responsibility (*o*).

*Form of.*] As to the direction, *teste*, and return of this writ, *see ante*, 378. In form, it must strictly pursue the judgment, and be warranted by it (*see ante*, 376); therefore, if a defendant be sued by a wrong name, and omit to take advantage of the misnomer, he may be arrested on a *ca. sa.* by such wrong name, and the sheriff may justify the caption under the writ (*p*); although we have seen, (*ante*, 101), that, for such an arrest upon *mesne process*, the defendant might maintain an action for false imprisonment (*q*).

Upon a *non est inventus* returned to the first *ca. sa.* the plaintiff may sue out an *alias* writ, and after that a *pluries*, directed to the same sheriff; or he may sue out a *testatum ca. sa.* directed to the sheriff of a different county; and each of these may have a clause of *non omittas* in it, if necessary. When a *testatum* writ is requisite, it is

(*j*) *Digby v. Alexander*, 9 *Bingh.* 412.

(*k*) *See ante*, 70; *Sherwood v. Benson*, 4 *Taunt.* 631; *Baker v. Ridgway*, 9 *Moore*, 114, 2 *Bingh.* 41, *S. C.*

(*l*) 2 *H.* 6, 12; *Bro. Abt. Executors*, 12; and *see ante*, 73.

(*m*) 2 *Saund.* 7, (n. 4).

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(*n*) *Bartlett v. Hobbes*, 5 *T. R.* 685; and *see Lunday v. Battins*, 2 *B. & Ald.* 234; and the cases *ante*, 65.

(*o*) *Sherwood v. Benson*, 4 *Taunt.* 631.

(*p*) *Cruceford v. Satchwell*, 2 *Str.* 1218.

(*q*) *See forms*, *Chit. Forms*, 294.



usual to sue out the *capias* and *testatum* at the same time, and to leave the former to be returned *non est inventus*, and the latter to be executed (r). If there be a mistake in suing out a *testatum* writ in the first instance, or a *ca. sa.* into a different county instead of a *testatum*, the mistake may be rectified in the same manner as in the case of a *fi. fa.* mentioned *ante*, 390. Regularly, the *alias*, &c. should be tested on the return day of the preceding writ; but this is not material, as the parties have no day in Court upon writs of execution.

*When to be sued out.*] As to this, see *ante*, 373, 374. It may be here observed, that a *ca. sa.* issued before the return of a *fi. fa.* which has been executed, is irregular; but a *ca. sa.* may issue before the return, or even at the same time as a *fi. fa.*, but they cannot both be executed. (*Ante*, 376). A *ca. sa.* cannot issue after an *elegit*, if lands have been taken under such writ (t).

*How sued out and indorsed.*] Engross your writ on plain parchment, and get it sealed; pay 7d.; or, for a non omittas, 1s. 2d. It need not be signed. At the time you get it sealed, you must produce to the sealer of the writs the postea, judgment paper, or inquisition, (R. II. 2 W. 4, r. 75; R. H. 2 & 3 G. 4), and, if any, the Judge's certificate for immediate execution. Indorse it thus: "Levy the whole, (or £ ), P. A., (James Street), plaintiff's attorney." You must not indorse the writ to levy any expenses or poundage, unless the action were for a penalty, as an action on a bond or the like, and your execution be for less than the penalty; or unless the defendant has by warrant of attorney or *cognovit*, or otherwise, expressly agreed to the levy of them. If you make this indorsement to levy the expenses, poundage, &c. do so as you would on a *fi. fa.* (*Ante*, 390). Indorse also the party's addition and place of abode, or such other description of him as you may be able to give. (R. II. 2 & 3 G. 4). A *ca. sa.* has been set aside for not complying with this latter rule (u), and the sheriff is not bound to execute the writ, and this although, at the time of receiving it, he made no objection to the want of the indorsement (x). If the action were against a seaman or soldier in his Majesty's service, for a debt contracted previously to his having entered the service, you must make an affidavit that the debt, damages, and costs amount to 20l. or upwards, and that the debt was contracted previously to the defendant's having entered his Majesty's service; and a memorandum of such oath must be indorsed on the writ before it can be executed. (See *ante*, 74).

As soon as your writ is prepared and sealed, leave it at the sheriff's office, with directions to give the warrant to the officer you intend should execute it; or give it in the first instance to the officer, who will procure the warrant (y) on it at the sheriff's office. The officer will then execute the writ, by arresting the defendant.

(r) See the forms, Chit. Forms, 298.

(x) *Hewrick v. Nanney*, 1 Dowl. P. C.

(t) Bac. Abr. Execution, (D); *ante*, 378.

(y) See the form, Chit. Forms, 302.

(u) *Clarke v. Palmer*, 2 B. & C. 183.

*When, where, and how executed.*] As to when the writ may be executed, see *ante*, 380. The mode of executing the writ, and every thing relating to the arrest, the privilege of the defendant, &c. are the same as in the case of a *capias ad respondendum*; (see *ante*, 112 to 120); excepting that upon an arrest in execution, the officer may carry the defendant at once to the county gaol, and upon mesne process he cannot do so for 24 hours after the arrest, if the defendant require it. (32 G. 3, c. 28, s. 2, *ante*, 122, 130) (z). The defendant, however, is usually carried to the house of the officer who arrests him, or of some other officer of the sheriff within the county, &c., and confined there until the return of the writ, if not sooner discharged, or removed to the King's Bench prison or the Fleet by *habeas* (a).

As to what is an escape, it should be observed, that if the sheriff carry a defendant in his custody out of the county, excepting in conveying him by the most convenient route to the county gaol, he would be guilty of suffering an escape (b), and even might be liable to an execution by the defendant for a false imprisonment (c). Allowing the defendant arrested on a *ca. sa.* to go about his affairs, even as it seems in the custody of the officer, is an escape (d). And if the sheriff, or other officer in whose custody the defendant is, suffer him to go out of the limits of the prison, for any the shortest time, although with a keeper, it is an escape (e); unless it be under the authority of a writ of *habeas corpus*, or, (if the defendant be in the custody of the marshal), of a day rule. (8 & 9 W. 3, c. 26) (f). And it makes no difference in this respect, whether the defendant were at large before or after the return of the *ca. sa.* (g).

If the escape be *negligent*, the gaoler may make fresh pursuit; and if he retake him before any action is brought for the escape, he shall be excused (h); and for this purpose, if the defendant were in custody of the marshal, an escape warrant may be obtained, upon application to a Judge at chambers, which will enable the marshal or other person obtaining it to retake the defendant in any part of England, and lodge him in the debtor's prison for the county where he is taken. (1 A. c. 6; 5 A. c. 9, s. 3) (i). So, if the defendant, after a negligent escape, return within the limits of the prison before an action is brought for the escape, the gaoler shall be excused (k). But if the escape be *voluntary*, the gaoler can never retake the defendant; and he would be liable to an action for false imprisonment if he did (l). But in either of these cases the plaintiff, instead of pro-

(z) *Evans v. Atkins*, 4 T. R. 555.

(a) See *Houlditch v. Birch*, 4 Taunt. 668.

(b) *Boston's case*, 3 Rep. 44; *Boothman v. Earl Surry*, 2 T. R. 5.

(c) *Bro. Escape*, 11.

(d) *Benton v. Sutton*, 1 B. & P. 24; *Balden v. Temple*, Hob. 202.

(e) 1 Ro. Abr. 808; 3 Co. 44; *Plowd.* 36; and see 8 & 9 W. 3, c. 26.

(f) See *Ross v. Green*, 1 Bur. 437, and 2 Bac. Abr. *Escape*, (B).

(g) *Hackins v. Plomer*, 2 W. Bl. 1048.

See 1 Saund. 35 a, 2 Id. 61 c, (n 4).

(h) 1 Ro. Abr. 808; *Whiting v. Reynel*, Cro. Jac. 657, W. Jon. 144; and see *Stinchimus v. Mullins*, 2 Str. 873.

(i) See 2 Bac. Abr. *Escape*, (E. 3).

(k) *Cornyns*, 554; *Bonafous v. Walker*, 2 T. R. 126; and see *Lenthall v. Lenthall*, 2 Lev. 109; *James v. Pierce*, Id. 131, 1 Vent. 269, S. C.

(l) *Carter*, 212; *Ravencroft v. Eyles*, 2 Wils. 295; *Atkinson v. Jameson*, 5 T. R. 25.

ceeding against the gaoler, may sue out a fresh *ca. sa.* against the defendant, or any other writ of execution against his lands or goods, or he may have an action of debt on the judgment (*m*). The new sheriff is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by indenture (*n*).

If the defendant be discharged out of prison, with the plaintiff's consent, it is of course no escape. (*See ante*, 128, 129) (*o*). But in order to excuse the gaoler in this case, it is necessary that the plaintiff's consent be given previously to, or at the time of the discharge, and not subsequently to it (*p*).

Whenever the sheriff, or his officer, receives an order for the defendant's discharge, search should be made in the sheriff's office to ascertain whether or not there be any other writs lodged against the defendant; for a person in custody at the suit of one plaintiff is in custody at the suit of any other person who delivers a writ to the sheriff before the discharge of the defendant (*q*).

The remedy against the sheriff or gaoler, for the escape, is by action of debt, or action on the case (*r*). Debt is in general the preferable form of action; because a verdict for the plaintiff therein must be for the full amount of the sum recovered (*s*).

As to a rescue: it is necessary to observe that the sheriff cannot excuse himself for a rescue of a person in execution, by returning the rescue, as he can in case of a rescue upon *mesne process*. (*Ante*, 384). If the defendant be rescued, therefore, you may either have an action against the sheriff or gaoler in whose custody he was (*t*), or you may sue out a fresh *ca. sa.*, or execution, against the defendant's goods, &c., at your option (*u*).

Payment of the sum indorsed on the writ to the sheriff or his officer, or to the marshal, is not deemed a payment to the plaintiff, and cannot, therefore, be a satisfaction of the judgment (*v*), as such a payment on a *fi. fu.* would have been (*x*). But payment to the attorney on record for the opposite party will satisfy the judgment (*y*).

*When and how returned.*] We have seen, (*ante*, 383), when and how the sheriff may be compelled to return the writ of execution in

(*m*) *Allanson v. Butler*, 1 Sid. 330; *Buxton v. Hons*, 1 Show. 174; *Basset v. Saller*, 2 Mod. 186; *Sedall v. Wytham*, Lutw. 1264; 8 & 9 W. 3, c. 26.

(*n*) *Davidson v. Symmour*, 1 M. & M. 34.

(*o*) 2 Bac. Abr. Escape, (F. 3).

(*p*) *Stott v. Pousock*, 1 Salk. 271; 1 Show. 174.

(*q*) *Frost's case*, 5 Rep. 89; *Benton v. Sutton*, 1 B. & P. 24.

(*r*) See 2 Bac. Abr. Escape, (F. G).

(*s*) 1 Saund. 37, 38; *Imagines v. Walker*, 1 T. R. 129; *Robertson v. Taylor*, Chlt. Rep. 454.

(*t*) 1 Ro. Abr. 807; *Crompton v. Ward*, 1 Str. 429; *O'Neill v. Marson*, 5 Bur. 2812.

(*u*) *Mouman v. Clayton*, Cro. Car. 240, 255; 1 Ro. Abr. 904; 8 Co. 142.

(*v*) *Frem. B42*; 12 Mod. 220; *Merton's case*, 2 Show. 139; *Blackford v. Austen*, 14 East, 468; *Allanson v. Atkinson*, 1 M. & S. 583.

(*w*) *Rook v. Withnot*, Cro. El. 209; *ante*, 369.

(*y*) 2 Show. 139; and see *Crozer v. Pilling*, 6 D. & R. 199, 1 B. & C. 26, S. C.

general, and how the return is to be made. The sheriff seldom, if ever, returns a *ca. sa.*, unless ruled or ordered by a Judge to do so; although in strictness he should make his return to every writ directed to him, whether ruled or ordered to do so or not. There is a material distinction in this respect between a *ca. sa.* or *fleri facias*, and writs of mesne process; for the sheriff may justify under these writs of execution, although he have not returned them; but he cannot plead a writ of mesne process in justification of an arrest under it, unless he have returned it (z).

Where the sheriff has been ruled to return the writ, if he have taken the defendant, he returns *cepi corpus*, or that the defendant is so ill that the sheriff cannot remove him without endangering his life (a); or if he have not been able to find him, he returns *non est inventus*; or if he could not execute the writ, on account of some privilege enjoyed by the defendant, or the like, he returns the fact specially, as, that the defendant had become bankrupt and obtained his certificate, or the like (b). If he return *non est inventus*, or make a special return, you may, if you think proper, contest the truth of it in an action for a false return. Excepting in cases of members of the royal family, peers, members of the House of Commons, ambassadors or their servants, it is not usual, or in general advisable, for the sheriff to take notice of the defendant's privilege, but to arrest him, and leave him to apply to the Court to be discharged, if he be entitled to it. (*Ante*, 409).

If the *ca. sa.* did not contain a clause of *non omittas*, and the sheriff have sent it to the bailiff of a liberty within his county, to be executed, he may return this matter on the writ, together with the bailiff's answer if he have received it (c).

A return of a rescue is bad, see *ante*, 384, 412.

If the sheriff's return be untrue, the plaintiff may maintain an action against him for his false return. (*Ante*, 399).

If the sheriff have not taken the defendant on the *sa. ca.*, the plaintiff may, if he wish, proceed to outlawry (d).

*Poundage and expenses.*] As to these, see *ante*, 585, 386.

*What writs may issue after it.*] If the *ca. sa.* be not executed, the plaintiff may, of course, sue out any other writ of execution, or he may have an *alias* or *pluries ca. sa.* (e). But if it be once executed, no other writ of execution can be sued out by the plaintiff against the defendant's goods or lands, whilst he remains in custody for the same debt. (*Ante*, 376). At common law, if the plaintiff had the defendant

(z) 21 H. 7, 22, 21; 5 Co. 90; *Frosmann v. Bluet*, 12 Mod. 849, 1 Ld. Raym. 632, 1 Salk. 400, Holt, 408, S. C. *ante*, 380.

(a) See *Baker v. Davenport*, 4 B. & Ald. 27; *Cavenagh v. Collett*, 8 D. & R. 606; *Perkins v. Meacher*, 1 Dowl. P. C.

21; and see form, Chit. Forms.

(b) See forms of returns, Chit. Forms.

(c) *Ante*, 384. See form, Chit. Forms.

(d) See Vol. 2, Book 4, Part 1, Chap. 2.

(e) See *Wood v. Harburne*, Yeiv. 52.

taken in execution, he could not afterwards, if the defendant died, have execution against his goods, &c.; but now, by stat. 21 J. 1, c. 24, if a party die in execution, the other party, at whose suit he was in custody, may sue out execution against his lands or goods, in the same manner as if the deceased had never been charged in execution.

*How far a discharge of judgment, &c.]* The effect of taking the party in execution is, that it operates as a satisfaction of the debt, so that the creditor has no other remedy to recover it, unless the party die, or escape, or be rescued (*f*). But it is no actual satisfaction so as to bar the plaintiff from taking out execution against other persons liable to the same debt and damages (*g*).

If the plaintiff discharge the defendant out of custody, he can never afterwards have him arrested upon the same judgment; and this, although the defendant agree that he may be again arrested (*h*); or even if he discharge a defendant arrested on a joint *ca. sa.* against several, he can neither retake him, nor afterwards arrest any of the others (*i*). This, of course, has reference only to cases where the plaintiff voluntarily discharges the defendant; but, where one of two defendants was discharged under an insolvent act, this was holden not to operate as a discharge of the other; for the discharge, in that case, was not the act of the plaintiff, but the act of law (*k*). And if the discharge of the defendant out of custody; were on account of any irregularity in the process or otherwise, it seems, he might be again taken on a regular writ (*l*).

*Irregular ca. sa.]* As to this, see *ante*, 388.

### 6: Execution for the Defendant.

If judgment be given for the defendant, he may have the same writs of execution for the amount of the costs awarded him, as the plaintiff might have had for his damages and costs, if he had judgment. (23 H. 8, c. 15, s. 1; 4 J. 1, c. 3, s. 2) (*m*). The defendant, however, must bear the expenses of the execution, and cannot levy the same on the plaintiff. (*Ante*, 386).

(*f*) *Crawley v. Lidgert*, Cro. Jac. 338; *Bacon v. Peak*, 1 Stra. 226; *Lancaster v. Fielder*, 2 Ld. Raym. 1451; *Foster v. Jackson*, Hob. 59; *Cohen v. Cunningham*, 8 T. R. 123; *Taylor v. Waters*, 5 M. & S. 103; *Beaven v. Robins*, 8 D. & R. 42.

(*g*) *Foster v. Jackson*, Hob. 59.

(*h*) 1 Ro. Abr. 307; *Vigers v. Aldrick*, 4 Bur. 2482; *Juques v. Withey*, 1 T. R. 537; *Tanner v. Hague*, 7 T. R. 420; 2

East, 243; 2 B. & Ald. 297.

(*i*) 2 Leon. 260; *Clarke v. Clement*, 6 T. R. 525; 6 M. & S. 413; 2 Moore, 235.

(*k*) *Nadin v. Battie*, 5 East, 147.

(*l*) *Mackie v. Warren*, 3 M. & P. 279, 5 Bing. 176, S. C.

(*m*) See the forms of writs of execution for defendant after verdict, Chit. Forms.

## SECT. 5.

*Proceedings against Bail.*

1. *Bail to the action, how far liable*, 415.
2. —————, *how discharged*, 416 to 429.
3. —————, *Proceedings against them*, 429 to 435.
4. *Bail in error, how far liable, &c.*, 435.
5. —————, *Proceedings against them*, 436.

1. *Bail to the Action, how far liable.*

Bail to the action are liable only to the sum sworn to by the affidavit of debt, or of any less sum (*n*) the plaintiff shall recover (*R. E. 5 G. 2, r. 2*), together with costs of the action against the principal, not exceeding in the whole the amount of their recognizance. (*R. H. 2 W. 4, reg. 21*) (*o*). And the Court will stay the proceedings in an action on the recognizance (*p*), or order an *exoneretur* to be entered on the bail piece (*q*), on payment of these two sums (the sum sworn to, and costs) (*r*); and this, although the sum sworn to be less than the damages actually recovered, or the sum named in the process (*s*), and the defendant in the original action have gone abroad (*t*). The practice of the Court of Common Pleas, in this respect, was formerly different (*u*). If the defendant in the original action were holden to bail under a Judge's order, the bail in such a case are liable to the extent of the sum ordered; or if a less sum be recovered, then to the sum recovered, and costs (*x*).

If an *action*, however, have been commenced against the bail, they must also pay the costs of such action, as well as the debt sworn to, and costs in the original action (*y*).

But bail are not liable to the costs of a *scire facias*, if they have not pleaded to it (*z*). Nor are bail to the action liable to pay the costs of a writ of error brought by their principal (*a*). Formerly, indeed, if a writ of error were brought after the bail were fixed, and proceedings had against them by *scire facias*, and the bail applied to stay the proceedings against them pending the writ of error, the Court would

(*n*) Though under a bailable amount, *semb. Thuraites v. Piper*, 4 D. & R. 194, *see vide* Tidd, 9 ed. 294.

(*o*) See the prior cases, *Jackson v. Hassell*, 1 Doug. 330; *Coles v. De Hayne*, 6 T. R. 246.

(*p*) *Clarke v. Bradshaw*, 1 East, 86, 91, *n*.

(*q*) *Jacob v. Bowes*, 6 East, 312.

(*r*) *Id.*

(*s*) *Clarke v. Bradshaw*, 1 East, 86; *Whetwright v. Simmons*, 5 M. & S. 511.

(*t*) *Clarke v. Bradshaw*, 1 East, 91, *n*;

and see *Coles v. De Hayne*, 6 T. R. 246.

(*u*) See *Dahl v. Johnson*, 1 B. & P. 205; *Hosell v. Wyke*, 1 B. & B. 400, Tidd, 9 ed. 280.

(*x*) See *Dahl v. Johnson*, 1 B. & P. 205.

(*y*) *Rez v. Lyon*, 3 Bur. 1461; *Perign v. Mellish*, 5 T. R. 363; *Hughes v. Piddwin*, 15 East, 254; *Abbot v. Rawley*, 3 B. & P. 13, 1 New Rep. 67; but see *post*, 422.

(*z*) See *Pocklington v. Peck*, 1 Str. 638; *Halduin v. Morgan*, 2 Str. 826.

(*a*) *Yates v. Doughan*, 6 T. R. 288.

do so, but only on the terms of the bail undertaking to pay the condemnation money, the costs of the *sci. fa.*, and (if there were no bail in error) the costs of the writ of error, if judgment should be affirmed (b). But had the writ of error been allowed before the expiration of the time given to the bail to render their principal, the bail would have been entitled to have the proceedings against them stayed, pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days after affirmance of the judgment (c); which means, of course, after the final determination of the cause, supposing two or more writs of error to be brought successively (d). And now to entitle the bail to a stay of proceedings, pending a writ of error, the application must in all cases be made before the time to surrender is out (e).

The bail to the action are not, it seems, liable to the payment of interest on the sum recovered subsequent to the judgment (f). But bail in error are, it seems, liable to interest on the judgment after affirmance. (*Post*, 435).

It is necessary to add, that bail remain liable as long as their names remain on the bail piece, even although they have not justified (g); and if, although they have not justified, proceedings be commenced against them on their recognizance, the Court will not relieve them except upon payment of costs (h).

## 2. Bail to the Action, how discharged.

*By death.*] If the principal die at any time before the return of the *ca. sa.* the bail are thereby discharged (i). But if he die after the *ca. sa.* is returnable (k), although before the return is filed (l), or even whilst the writ yet remains in the sheriff's office (m), the bail are fixed, and the Court cannot relieve them. Where the principal dies before the return of the *ca. sa.*, the bail should apply to the Court, or to a Judge at chambers in vacation, to have an *exoneretur* entered on the bail piece.

*By bankruptcy.*] If the principal become bankrupt, and obtain his certificate before the bail are fixed, the bail are thereby discharged, in all cases where the certificate is a bar: but if the bail be fixed before the allowance of the certificate, they remain liable, and the Court cannot relieve them (n). The Court of Common Pleas have

(b) *Buchanan v. Alder*, 3 East, 546; *Capron v. Blyton*, 1 New Rep. 67.

(c) *Sprang v. Monprie*, 11 East, 316; R. T. 1 A. T. 1 (a); *Capron v. Archer*, 1 Bur. 344.

(d) *Kershaw v. Cartwright*, 5 Bur. 2819. See upon this subject, *ante*, 339, 343.

(e) R. H. 2 W. 4, r. 84; *post*, 434.

(f) *Waters v. Rees*, 3 Taunt. 503.

(g) *Waller v. Green*, Say. 308; *Fulke v. Bourke*, 1 W. Bl. 462; *Humphry v. Leite*, 4 Bur. 2107; *Bramwell v. Farmer*, 1 Taunt. 427; *Res v. Sheriff of Middle-*

*sex*, in the cause of *Logan v. Lovel*, 3 M. & P. 594, 6 Bing. 251, S. C.

(h) *Gould v. Holstrom*, 5 East, 581; *Humphry v. Leite*, 4 Bur. 2107.

(i) W. Jon. 136.

(k) *Glyn v. Yates*, 1 Str. 511; *Perry v. Berry*, 2, Id. 717, 2 Ld. Raym. 1452, S. C.; *Fildes v. Poplewell*, 2 Wils. 63.

(l) *Randolph v. Gunston*, 6 T. R. 284. (m) 2 Sellon, 55.

(n) *Woolley v. Cobb*, 1 Bur. 244; *Manin v. Partridge*, 14 East, 599; *Harmer v. Hagger*, 1 B. & Ald. 332; *Johnson v.*

also decided, that if a creditor prove his debt under the commission, he cannot afterwards proceed against the bail (*o*). An *exoneretur* has been ordered to be entered on the bail piece, where the defendant had become a bankrupt and obtained his certificate in a foreign country, after the contraction of the debt, and it appeared that the plaintiff resided in the same country with him at the time of the bankruptcy (*p*); but the Court refused to do so in another case, where it appeared that the plaintiff was resident in this country at the time of the defendant's bankruptcy abroad (*q*).

If the certificate be obtained before the bail are fixed, the bail should apply to the Court, or to a Judge at chambers in vacation, to have an *exoneretur* entered on the bail piece (*r*), for they cannot plead the bankruptcy and certificate of their principal in their own discharge (*s*). And this application should be made before any proceedings are had against the bail, otherwise they will have to pay the costs of such proceedings (*t*); and where there has been much delay, the Court have in one instance altogether refused to relieve them (*u*). In a late case, where the defendant obtained his certificate after issue and before judgment, the Court of Common Pleas refused after judgment to enter an *exoneretur* on the bail piece (*x*). This Court, however, generally speaking, will order an *exoneretur* to be entered on the bail piece in all cases where the defendant is entitled to be discharged out of custody; and, therefore, where a defendant obtained a certificate under a commission of bankruptcy before trial, and did not plead it *puis darrein continuance*, the Court relieved the bail on motion (*y*). If the validity of the commission be disputed, it seems the Court will order it to be tried on a feigned issue, before they direct an *exoneretur* to be entered (*z*); but they will not direct an issue to try whether the principal was a trader, &c., for on those points the certificate is conclusive (*a*).

*By discharge under insolvent act.*] If the defendant be discharged under an insolvent act, before his bail are fixed, the bail may apply to have an *exoneretur* entered on the bail piece, in the same manner as if he had become a bankrupt and obtained his certificate (*b*). If the bail be fixed before defendant's discharge, and after such discharge

*Lacey*, 1 B. & C. 247, 2 D. & R. 385, S. C.; *Stapleton v. Macbar*, 7 Taunt. 589; *Thackeray v. Turner*, 8 Id. 26; *Walker v. Giblett*, 2 W. Bl. 811; *Payne v. Spencer*, 6 M. & Sel. 231; *West v. Ashdown*, 1 Bingham 164, 7 Moore, 506, S. C.

(*o*) *Aylett v. Harford*, 2 W. Bl. 1317; *Lingard v. Comyn*, 2 Taunt. 246.

(*p*) *Ballantine v. Golding*, 4 T. R. 185, n.

(*q*) *Podder v. M'Master*, 8 T. R. 609.

(*r*) *Martin v. O'Hara*, Cowp. 824.

(*s*) *Danelly v. Dunn*, 2 B. & P. 45;

*Beddoose v. Holbrooke*, 1 Id. 450, n. 448;

(*t*) *Mannin v. Partridge*, 14 East, 599;

*Harmer v. Hagger*, 1 B. & Ald. 328; *Thackeray v. Turner*, 8 Taunt. 28.

(*u*) *Swaine v. Bland*, 4 D. & R. 373; and see *Clarke v. Hoppe*, 3 Taunt. 46.

(*x*) *Humphreys v. Knight*, 4 M. & P. 370, 6 Bingham 549, S. C.

(*y*) *Todd v. Mansfield*, 3 B. & C. 222, 5 D. & R. 258, S. C.

(*z*) *Tidd*, 308; and see *Stacey v. Frederick*, 2 B. & P. 360; *Woolcott v. Leicester*, 6 Taunt. 75.

(*a*) *Harmer v. Hagger*, 1 B. & Ald. 328.

(*b*) *M.S. East* 1814; *Anon. v. Bruce*, 2 Chit. Rep. 105; and see *Shakespeare v. Phillips*, 8 East, 493.



they pay the debt, they may recover it of him notwithstanding such discharge (c).

*By render.*] Bail may wholly discharge themselves of their responsibility by rendering their principal; and this may be done either before or after judgment.

Bail to the *sheriff* may be discharged, either by bail above being put in and justified, or by bail above being put in and the principal thereupon rendered, which is deemed equivalent to perfecting bail; and this may be done either by the bail to the sheriff, or by the defendant himself, or by the sheriff, or by the defendant's attorney in discharge of any undertaking he may have given. (*See ante*, 151). Bail above may be put in by the *defendant*, and the defendant rendered, even *before the return of the writ*, and the plaintiff cannot afterwards take an assignment of the bail bond (d); or he may be rendered or render himself, to the sheriff, in such a case, if the sheriff choose to accept of the render, before or on the return day, and the bail bond may then be cancelled. (*Ante*, 150) (e). But bail above cannot be put in before the return of the writ, for the purpose of rendering the defendant, without his consent (f). Formerly, if the sheriff were ruled to bring in the body, a render afterwards would not prevent an attachment, unless the bail above also justified. But by *R. T. 33 G. 3*, bail may render their principal, at any time before the return of the rule to bring in the body, without justifying, the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, and making affidavit thereof (g); which rule extends as well to cases where the bail is put in by the sheriff (h), as to those where it is put in by the defendant or his sureties. Even after assignment of the bail bond (i), and proceedings had thereon (j), bail above may be put in, and render the principal, without justifying, and the Court will then stay the proceedings on the bail bond, upon payment of costs. (*Ante*, 147, 148) (k). If, however, the plaintiff proceed against the sheriff, the render must in general be made before the expiration of the rule to bring in the body. (*See ante*, 136, 137). And where the render was after the usual time for putting in bail had expired, but after further time given, the render was held too late, and an attachment issued after notice thereof regular (l).

Bail above may, as a matter of right, at any time pending the suit, or before the return of a *ca. sa.* against their principal, surrender him

(c) *Powell v. Rason*, 1 M. & Scott, 68, 8 Bingham, 25, S. C.

(d) *Hyde v. Whiskard*, 8 T. R. 456; *Ross v. Sweet*, 9 Moore, 556, 2 Bingham, 271, S. C.

(e) *Maddocks v. Bulcock*, 1 B. & P. 325; *Chapm. Pr.* 148.

(f) *Birt v. Roberts*, 1 M. & M. 177; *Rex v. Hughes*, 3 C. & P. 373.

(g) 5 T. R. 368.

(h) *Rex v. Sheriff of Middlesex*, 7 T.

R. 527.

(i) *Edwin v. Allen*, 5 T. R. 401.

(j) *Meysey v. Carnell*, 5 T. R. 534.

(k) *See Brown v. Gillies*, 2 B. & Ald. 769, 1 Chit. Rep. 496, S. C.

(l) *Rex v. Sheriffs of London*, 1 Chit. Rep. 567; and see 8 T. R. 29; but see 1 H. Bl. 9; 2 B. & P. 38; by which it seems the practice of the Common Pleas is different.

in their discharge, and may plead this render in any action against them. The Court, also, as matter of favour, have allowed the bail a further time, after the return of the *ca. sa.* to render their principal; which, however, being mere matter of favour, cannot be *pleaded*, but the bail may have the full effect of it upon motion (*m*). The additional time here mentioned is regulated thus:—If the plaintiff proceed against the bail by *action of debt*, the bail have fourteen days next after the service of the process upon them wherein to render their principal, but not at any later period; and upon such render being duly made, and notice thereof given, the proceedings will be stayed on payment of the costs of the writ and service thereof only. (*R. T. 3 W. 4, 17th June, 1833*) (*n*). Sunday is reckoned as one of the days, if it be not the last day of the fourteen (*o*).—If the plaintiff proceed against the bail by *sci. fa.*, the bail have until the return-day of the *sci. fa.* to render their principal (*p*). Formerly, if the render were made after action brought, on the last of the days limited for it, it must have been made before the Court rose (*q*): but now by *R. H. 2 W. 4, r. 22*, such render, either after an action or *sci. fa.*, may be made any time before the prison doors are closed for the night.

The Court will not enlarge the times above mentioned; even on the ground that the principal could not be removed without endangering his life (*r*), (unless he be already in custody, and his illness be returned specially on the *habeas corpus*) (*s*); or that he has become a lunatic (*t*) (except under very special circumstances) (*u*); or that he was unwarrantably arrested and detained by a foreign enemy (*x*); for the bail are not to be excused from the performance of the condition of their recognizance, merely because the render has become impossible without any default of theirs, unless the impossibility have arisen from some act or law of our own state (*y*). But if, from any act or law of our own state, it become impossible to render a defendant (*z*); as if he have been actually sent out of the kingdom under the alien act (*a*); or be actually on board a convict ship, in order to be transported (*b*); or when a seaman, being out upon bail for a debt

(*m*) See *Wilmore v. Clark*, 1 *Ld. Raym.* 156; *Anon.* 1 *Salk.* 101.

(*n*) See the former rule, *R. T. 1 A. r. 1*; *Milner v. Pettit*, 1 *Ld. Raym.* 720; *Fisher v. Brancumbe*, 7 *T. R.* 355; *Wilkinson v. Vase*, 8 *T. R.* 422; *Hoare v. Minsay*, 2 *Str.* 913; and see *Meddowncroft v. Sutton*, 1 *B. & P.* 61.

(*o*) See *Crowell v. Green*, 14 *East*, 537; *R. H. 2 W. 4, r. viii. ante*, 58.

(*p*) *Anon.* 8 *Mod.* 340; *Wilmore v. Clark*, 1 *Ld. Raym.* 156; *Simmonds v. Middleton*, 1 *Wils.* 270; *Mannin v. Partridge*, 14 *East*, 580. In actions by original, when that process was in use, the bail had until the *quarto die post* of the return of the *sci. fa.* to render the principal. *Bailey v. Smeethman*, 4 *Bur.* 2134; *Simmonds v. Middleton*, 1 *Wils.*

269.

(*q*) See *post*, 438; and see *Lardner v. Passage*, 2 *H. Bl.* 593; *Simmonds v. Middleton*, 1 *Wils.* 270.

(*r*) *Wynn v. Petty*, 4 *East*, 102; *Grant v. Fagan*, *Id.* 190.

(*s*) 16 *East*, 384.

(*t*) *Cock v. Bell*, 13 *East*, 355.

(*u*) *Id.*

(*x*) *Grant v. Fagan*, 4 *East*, 188.

(*y*) *Id.* 190. See *Glendining v. Robinson*, 1 *Taunt.* 390.

(*z*) See the notes in 13 *Price*, 525, 532.

(*a*) See *Fulkein v. Crikes*, 13 *East*, 457.

(*b*) *Wood v. Mitchell*, 6 *T. R.* 247; *Fowler v. Dunn*, 4 *Bur.* 2134.

under 20*l.*, is impressed into the King's service (c); or the like (d); the Court, upon application, will at once order an *exoneretur* to be entered on the bail-piece. So, if he become bankrupt, the Court will enlarge the time for surrendering him until after he has finished his last examination (e). And where a defendant is in custody under a warrant of commissioners of bankrupt, the Court will enlarge the time for rendering the defendant, though the bail have not justified (f). The Court will enlarge the time for bail to render a defendant, who is under imprisonment in a county gaol upon a conviction for libel, until a week after the imprisonment under the sentence has expired; but not until a week after the term for which he was sentenced to be imprisoned (g). It must always be sworn that the application is made on behalf of the bail (h). In all other cases, the bail must render their principal within the time above mentioned, or pay the debt and costs.

If the defendant be *not* in custody, the render may be to the prison of the Court (*i.e.* the King's Bench Prison), or to the gaol of the county wherein the defendant was arrested; and for the latter purpose a Judge's order must be obtained, which is to be lodged with the gaoler; and a written notice of the lodgment of such order, and of the defendant's being in custody of such gaoler, must be delivered to the plaintiff's attorney or agent (i). If the defendant be *already in custody* at a civil suit, the bail might always, as a matter of course, have had a *habeas corpus*, as of right, to bring him up in order to render him (k). But now such *habeas corpus* is unnecessary, and the render may be made, in the preceding manner, as where he is not in custody. If, however, he be in custody at the *king's suit*, application must be made to the Court for leave to sue out a *habeas corpus* to bring him up in order to render him. Thus, the Court have granted a *habeas*, to bring up a defendant who was in custody of the sheriff under a charge of felony, in order that he might be rendered in discharge of his bail (l); and the same, even if the principal were convicted and under sentence of transportation (m), provided he was not at the time actually on board the convict-ship in order to be transported (n). So, a *habeas* will be granted for the same purpose, to bring up a principal, who has been committed to Newgate by the commissioners of bankrupt (o). Even if the principal be in the house of

(c) *Robertson v. Paterson*, 7 East, 405. and see *ante*, 400, 73.

(d) See *Maude v. Jowett*, 3 East, 145. (e) *Id.*; *Offley v. Dickens*, 6 M. & Sel. 348.

(f) *Gibson v. White*, 1 Dowl. P. C. 297, 2 C. & J. 85, 2 Tyr. 162, S. C.; and see *Harris v. Alcock*, 2 C. & J. 486.

(g) *Campbell v. Ackland*, 1 C. & M. 73, 1 Dowl. P. C. 635, S. C.; and see *Roush v. Boucher*, 10 Price, 104; *Ashmore v. Fletcher*, 15 Id. 523.

(h) *Harris v. Glossop*, 2 Chlt. Rep. 101.

(i) 1 W. 4, c. 70, s. 21; *post*, 421.

(k) See *Betteauworth v. Roll*, 3 Bur. 1876.

(l) *Sharp v. Sheriff*, 7 T. R. 226; *Daniel v. Thompson*, 15 East, 78. See *Currin v. Kinnear*, 1 B. & B. 23, 3 Moore, 259, S. C.

(m) *Vergen's case*, 2 Str. 1217; *Joyce v. Pratt*, 4 M. & P. 55, 56, 6 Bligh. 377, S. C.

(n) *Forcier v. Dunn*, 4 Bur. 2034. *Fide supra*.

(o) *Taylor's case*, 3 East, 232; *Hodgson v. Temple*, 1 Marsh. 166.

correction, provided he be there for safe custody only, and not for punishment, this Court will grant a *habeas* to bring him up, to render him in discharge of his bail, and will then recommit him to the custody of the sheriff (*p*); but they will not do so, if the principal be in the house of correction for punishment (*q*). So, a king's debtor in the Fleet may be brought up by *habeas* to this Court, in order to render him in discharge of his bail in an action here (*r*). The Court have also granted writs of *habeas*, for the same purpose, to bring up an impressed man in custody at the Savoy (*s*), and a lunatic confined in St. Luke's hospital (*t*). But when the principal, an alien, was in the custody of a messenger, for the purpose of being sent out of the kingdom under the alien act, the Court refused a *habeas*, as his passage had already been taken in a ship immediately about to sail, and if he were brought up, it was probable the ship would sail without him; but they intimated that as soon as he had actually sailed, they would allow an *exoneretur* to be entered on the bail piece (*u*).

*Before or on the return day of the writ* (i. e. before or on the eighth day inclusive after the arrest) the render may be made, and the bail to the sheriff discharged, *without putting in special bail*, provided the sheriff chooses to accept of such render; if the sheriff refuse to accept of the render, then special bail must be put in, though this cannot be done without the defendant's consent. (*Ante*, 418).

*After the return day of the writ*, where special bail have not already been put in, and where bail to the sheriff are desirous of rendering their principal, special bail must be put in before the render can be made (*x*). This, as has been before remarked, *ante*, 418, may be done either by the defendant, or by the bail below, or by the sheriff: or even if the defendant put in bail for the purpose of justifying, special bail may also be put in by the bail below or the sheriff, within the time limited for that purpose, for their own security, if they suspect that the bail put in by the defendant will not render him in the event of their not justifying; and the bail thus put in by the bail below, or sheriff, may immediately take and render the defendant, upon his own bail failing to justify (*y*). It has been holden also, that bail who have justified, may, even after final judgment, cause the names of two others to be added to the bail piece, for the purpose of rendering the principal, upon leave of the Court, or a Judge's order being obtained for that purpose (*z*). As the putting in of bail, in such a case, however, is mere matter of form (*a*), and as it is not necessary that the bail so put in should justify (*b*), any person, however in other cases

(*p*) *Gunn v. Cromer*, MS. T. 1825.

(*q*) See *Brandon v. Davis*, 9 East, 154.

(*r*) *Boies's bail*, 1 Str. 641; *Chitty's case*, 1 Wils. 248.

(*s*) *Bond v. Isaac*, 1 Burr. 339.

(*t*) *Pillip v. Sarton*, 3 B. & P. 550.

(*u*) *Folkein v. Critico*, 13 East, 457.

*Vide supra*.

(*x*) *Harrison v. Davies*, 5 Bur. 2683.

(*y*) *Birchere v. Colson*, 2 Str. 876; 1

Barnard. 369. See *Taylor v. Evans*, 8 Moore, 389, 1 Bligh. 367, S. C.

(*z*) *Davidson v. Fowler & al.* MS. H. 1820, 2 Chit. Rep. 74, S. C.

(*a*) MS. East. 1817.

(*b*) *Mitchell v. Morris*, 2 W. Bl. 1179, 750; *Wiggins v. Stephens*, 5 East, 533; *Wale v. Walker*, 1 H. Bl. 638; *Seaver v. Spraggan*, 2 New Rep. 85, and *ante*, 418.

unqualified, such as an attorney or attorney's clerk (c), or the like, will be sufficient for that purpose. In this Court, bail who had been rejected, were still competent to render the defendant, so long as they remained on the bail piece (d); though it was otherwise in the Common Pleas, where they must have entered into a fresh recognizance, before they could have rendered the defendant (e); but now, "bail though rejected shall be allowed to render the principal, without entering into a fresh recognizance;" (*R. H. 2 W. 4, r. 20*) (f); and the same, where one only of the bail justifies, he and the other may render the principal (g). Also, where bail were excepted to, and two others added, and only one of the added bail justified, the Court held that the former two might render the principal; their names still remaining on the bail piece (h). Although the putting in of bail, in this case, is mere matter of form, yet in point of form it must be strictly regular; therefore, when one bail only was put in, a render by that one was holden bad, and the plaintiff was allowed to proceed upon the bail bond (i). But, it seems, there is no occasion for a notice of putting in bail, who are so put in merely for the purpose of rendering the defendant, though it is otherwise in the Common Pleas (j). See as to the mode of putting in bail, *ante*, 153.

The mode of rendering a defendant, when at large, to the King's Bench prison, is thus: Take the defendant to the Court, if sitting; or, which is much more usual, to the Judge's chambers (k); and upon giving the Judge's clerk a memorandum of the state of the cause, and (if before final judgment) the sum sworn to, or (if after final judgment) the amount of the debt and damages, or damages, as the case may be, he will make out the render and commitment, and deliver the defendant to the tipstaff, who will thereupon convey him to the King's Bench prison. Pay the Judge's clerk 9s. 6d.; tipstaff 6s. (l); and pay the tipstaff also 3s. 6d. for a certificate that the defendant is in the marshal's custody, which he will give you (m). The render may be made by the party himself without an attorney (n). Under the commitment shall be added the state in which the cause or causes stand at the time of such surrender; if before declaration, "the sum sworn to on the arrest;" if a declaration hath been filed or delivered, then to the sum sworn to shall be also added "declaration filed or delivered," "issue joined," or "interlocutory judgment signed," as the case is: if after final judgment in debt, "the debt and damages;" in other cases, "the quantum of the damages." (*R. E. 8 G. 3*). It may be

(c) *Jackson v. Trinder*, 2 W. Bl. 1180; *Bell v. Gale*, 1 Taunt. 163, per Heath, J.; *R. H. 2 W. 4, r. 13*.

(d) *Sayer v. Vordenham*, 6 M. & Sel. 218; 1 Chit. Rep. 446; see also *Hardwick v. Bluck*, 7 T. R. 297.

(e) 1 Taunt. 163; and see 3 Moore, 240a.

(f) *Res v. Sheriff of Middlesex*, in *Logan v. Lovell*, 6 Bingh. 251, 3 M. & P. 504. S. C.

(g) *Mills v. Head*, 1 New Rep. 138, n.

(h) *Res v. Sheriff of Essex*, 5 T. R.

633.

(i) *Scrymgeour v. Dryther*, Cro. El. 672; *Barnes*, 46, 173.

(j) See *Wilson v. Griffin*, 2 C. & J. 683; *Tidd*, 9th ed. 253.

(k) But this does not seem necessary, unless the defendant desires it. *Davis v. Fowler*, 2 Chit. Rep. 74.

(l) See *Re Salisbury*, 5 B. & Ald. 266.

(m) See the form of the memorandum, Chit. Forms, 309; of the minute of the render and commitment, *Id.* 310.

(n) *Nethercole's bail*, 2 Chit. Rep. 90.

necessary to add, that if the defendant do not come voluntarily to be rendered, the bail may seize him; even bail put in by the sheriff's officer, without the defendant's privity, after the return of the writ, may seize and render him (p). Bail may even justify breaking and entering a house, (the outer door being open), in which the principal resides, in order to seek for him, for the purpose of rendering him (q). They may take him, although a bankrupt, and attending before the commissioners for the purpose of being examined, and during the forty-two days after his surrender, when in other cases he is privileged from arrest. (*Ante*, 116, 129) (r). They may also, it seems, take him on a Sunday (s). When taken, one of the bail must constantly stay with him (unless he consent, in writing, to remain in the custody of some other person; in which case, he is usually lodged in the house of an officer) until he is rendered (t).

When the render is thus made, the defendant or his attorney must, without delay, give notice of such render to the plaintiff's attorney, and shall make affidavit thereof before the bail in that action shall be filed or discharged; and in default thereof such render shall be void. (*R. T. 1 A. r. 2*). And by *R. T. 1 A. r. 1*, if the bail be impleaded by action of debt upon the recognizance, then upon notice of the render being given to the plaintiff or his attorney, all further proceedings against the bail shall cease. This, of course, supposes the render to have been made within the time allowed for that purpose by the practice of the Court; for otherwise the plaintiff may treat it as a nullity. Where there was a delay of twenty-six days in filing the notice of render, the Court, nevertheless, under circumstances, relieved the bail (u). If the plaintiff proceed in the action, after notice of the render, because no tender was made to him of the costs already incurred, nor any rule obtained to stay the proceedings, the subsequent proceedings will be irregular, the above rule of Court of itself operating as a stay of proceedings (v). So, if the principal be rendered before any proceedings are had against the bail, but, in consequence of notice thereof not being given, the plaintiff proceeds upon the bail bond or recognizance, the Court will, at any time, even after execution levied against the bail (x), set aside the proceedings and allow an *exoneretur* to be entered, upon payment of costs (y); and in some recent cases, proceedings have been set aside even without payment of costs (z). In a late case, where the sheriff arrested the defendant on the 13th November, on a writ returnable the 15th,

(p) *Rex v. Butcher, Peake*, 100; *Birt v. Roberts*, 1 M. & M. 177; but see *Taylor v. Evans*, 1 Bingh. 367, 8 Moore, 308.

(q) *Sheers v. Brooks*, 2 H. Bl. 120.

(r) MS. East. 1817.

(s) *Anon.* 6 Mod. 231, and *ante*, 119, 129; but see *Brooks v. Warren*, 2 W. Bl. 1273, *contra*.

(t) 1 Sel. 170; but see *Pye v. Stow*, 3 Taunt. 423.

(u) *Brookhouse v. Sheriff of Derbyshire*,

5 B. & C. 244, *infra*.

(v) *Byrne v. Agutter*, 3 East, 308.

(z) *Lepine v. Barrat*, 8 T. R. 222; *Thorne v. Hutchinson*, 4 D. & R. 712, 3 B. & C. 112, 8 C.

(y) *Hughes v. Bidevin*, 15 East, 254; *Abbot v. Rawley*, 3 B. & P. 13.

(z) *Cresswell v. Hearne*, 1 M. & Sel. 742; *Smith v. Lewis*, 16 East, 108. See the form of the notice, Chit. Forms, 309; and of affidavit of service, *id.*

and suffered him to go at large without a bail bond, and afterwards returned *cepi corpus*; and bail above were put in on the 17th December, and on the same day the defendant was rendered, but no notice of the render was given until the 13th January; and an action was, on the 19th December, brought against the sheriff for the escape; the Court, nevertheless, stayed the proceedings upon payment of costs up to the time when notice of render was given, and the costs of the motion (a). After the render is thus made to the King's Bench prison, take the above affidavit of service of the notice of render to the Judge's clerk or officer (b) who has the bail piece, and he will give it to you, keeping the affidavit as his voucher. Take the bail piece, and the certificate given to you by the tipstaff as before mentioned, to the master (c), who will enter an *exoneretur* (d) upon the bail piece, keeping the certificate as his voucher; pay him 2s. 4d. Next, take the bail piece, and file it with the signer of the writs; pay him 4d. And, lastly, though not absolutely requisite (e), enter the render and committitur in the marshal's book, which is kept in the office of the clerk of the judgments; you will see the form of the entry there. The above affidavit of service and the certificate are not required in order to make the render a discharge of the sheriff (f); they are only necessary in order to discharge the bail; for you cannot get an *exoneretur* entered without them. And the *exoneretur* is essentially necessary to render in discharge of bail; for until this be made, the bail still remains liable, even although the defendant be in prison (g); but it is not of course necessary in order to discharge the sheriff. Where the attorney omitted to get the *exoneretur* entered, and proceedings were subsequently had against the bail, the Court set aside the proceedings upon payment of costs, and ordered the *exoneretur* to be entered and the bail piece filed (h). So, where the bail piece had been delivered to the plaintiff's attorney to be filed, who had neglected to file it, the Court held that the plaintiff could not proceed against the bail for want of an *exoneretur* being entered on the bail piece (i).

The mode of rendering a defendant when at large to the *gaol of the county* wherein he was arrested, is pointed out by the 1 W. 4. c. 70,

(a) *Brookhouse v. Sheriff of Derbyshire*, 5 B. & C. 944.

(b) Probably the Master.

(c) Or in C. P. to the filacer of the proper county.

(d) In the Exchequer this entry is unnecessary to exonerate the bail. Chap. Prac. 147.

(e) MS. E. 1819; *Rex v. Sheriff of Middlesex*, 1 Chit. Rep. 364; *Rex v. Sheriff of Middlesex*, in *Phillips v. Dove*, 9 B. & Ald. 607, 1 Chit. Rep. 359, S. C.; and see *Hutchins v. Kewrick*, 2 Bur. 1049; *Watson v. Sutton*, 1 Salk. 272. In actions by original, when that process was in existence, the render to the King's Bench prison was made in the same manner as is above mentioned, excepting that you filed the affidavit of

the service of notice with the clerk of the rules; and, instead of taking the certificate given you by the tipstaff to the master's office, you took it to the filacer with whom the bail was put in, and he got the master to enter an *exoneretur* in his book, keeping the certificate as his voucher.

(f) MS. E. 1819; *Rex v. Sheriff of Middlesex*, in *Phillips v. Dove*, 2 B. & Ald. 607, 1 Chit. Rep. 359, S. C.

(g) Comb. 263; *Wild v. Harding*, 8 Mod. 282, 340; and see *Rex v. Sheriff of Essex*, 5 T. R. 633; *Williams v. Williams*, 1 Salk. 98; *Rex v. Sheriff of Middlesex*, 6 Bingh. 251, 3 M. & P. 594, S. C.

(h) *Weaver v. Chandler*, Say. 7; and see *Knight v. Winter*, Barnes, 68.

(i) *Wild v. Harding*, 8 Mod. 280.

s. 21, to be in the manner following:—*The defendant, or his bail, or one of them, must obtain an order of a Judge of either of the Courts, and must lodge it with the gaoler, and a written notice of the lodging of such order, and of defendant's being actually in custody of such gaoler by virtue of such order, signed by defendant or the bail, or either of them, or by the attorney or agent of any or either of them, must be delivered to the plaintiff's Attorney or agent (g). The sheriff or other person responsible for the custody of debtors in such county gaol on such render so perfected, will be duly charged with the custody of the defendant, and the bail will be thereupon exonerated. In order to complete the render, so as to obtain an exoneretur and discharge the bail, you should make an affidavit thereof, and of the service of the notice (g). You should also, it seems, get a certificate, as mentioned ante, 422, from the gaoler or keeper, and then proceed as directed ante, 424, mutatis mutandis.*

A defendant when in custody in a county gaol by virtue of process out of any of the superior Courts of record, may be rendered in any other action depending in any of such Courts, in the manner above mentioned; and the keeper of the gaol, or such sheriff or other person responsible for the custody of debtors will on such render be duly charged with the custody of the defendant, and the bail will be thereupon exonerated (h).

If the defendant have escaped, and be retaken under an escape warrant, and lodged in the gaol of the county, &c., in which he is taken, his bail may have a writ directed to the sheriff of such county, commanding him to detain and keep such prisoner in custody in discharge of his bail; and the delivery of such writ to the sheriff shall be deemed an effectual render, and the sheriff shall afterwards be liable if the prisoner escape. (1 A. r. 6, s. 3).

Where the defendant is already in custody, at the king's suit, or on a criminal account, you must have him brought up by *habeas corpus*, as mentioned ante, 420. As to the mode of suing out the *habeas*, see Vol. 2, Book 4, Part 1, Chap. 3 (i). As soon as the defendant is brought up under this writ, the render is then made as is directed. (Ante, 422, 423).

The sheriff shall have the benefit of a render made by the defendant or the bail below; and the bail below shall have the benefit of a render made by the sheriff or the defendant.

As to the time to which a render relates: a render before the first day in full term is deemed a render of the preceding term.

*By variance between the declaration and writ, or affidavit, &c.] We have already seen (ante, 90, 94). how far the bail will be discharged by a variance between the writ and affidavit to hold to bail. Before the stat. 2 W. 4, c. 39, it seems, that a variance between the cause of action stated in the writ and the declaration, or the want of such statement in the writ, was no ground for discharging the defendant or the bail*

(g) See the forms, Chit. Forms.

(i) See the form of the writ, Chit.

(h) 1 W. 4, c. 70, s. 22. See the forms, Chit. Forms.

Forms.



*in toto*; but the bail bond or recognizance of bail was to be taken with a penalty or sum of 40*l.* only (*k*). But now, in actions commenced by the process prescribed by that act, should such a variance or omission occur, it would, it seems, not only discharge the bail, but also render the proceedings irregular. (See *ante*, 110). If the writ were in trespass on the case and the declaration in debt, or if the writ were in *assumpsit* and the declaration in trover, or the like (*l*), it would be a variance. If the writ be to answer the plaintiff generally, and not in a special character "*as*, administratrix," his declaring in a special character will not discharge the bail; *aliter*, if the writ be to answer the plaintiff in such special character (*m*). If the plaintiff declares for a different cause of action from that mentioned in the affidavit to hold to bail, he thereby discharges the bail *in toto* (*n*). As if the affidavit be in *assumpsit* and the declaration in trover (*o*); or the affidavit be upon a bill of exchange, and the declaration in covenant (*p*); or if the declaration vary from the affidavit in the cause of action, or in the number of defendants (*q*); or in the name of the defendant (*ante*, 90); or if the plaintiff declare in his own right upon an affidavit in *autre droit*, or *vice versa* (*ante*, 90): in these cases the bail are discharged of their liability, and the Court, or a Judge, upon application, will order an *exoneretur* upon the bail piece, and will not allow the declaration to be amended, so as to re-charge the bail with their liability (*r*). Where, after issue joined in *assumpsit* for goods sold, the plaintiff added a special count for not delivering a bill of exchange, and recovered on that count *only*, it was holden that the bail were discharged (*s*). But where a defendant has been arrested in an entire sum for goods sold and money lent, and the declaration contains no count for goods sold, the bail will not be discharged (*t*). A trifling variance in the names of the parties does not seem a ground for discharging the bail (*u*). And where a defendant was holden to bail by a wrong Christian name, but put in and justified bail above by his right name, and the plaintiff declared against him by such right name, the bail were not exonerated (*x*). So, when the affidavit to hold to bail was against A., the writ against A. and B., and the declaration against A., who alone put in bail, the Court of Common Pleas held it to be regular (*y*). Formerly, if an original writ issued into one county, and the *venue* was laid in another, the

(*k*) See R. H. 2 W. 4, r. 10, and 13 C. 2, c. 2, s. 2, and the prior authorities, 2 Saund. 72*n*; R. H. 8 C. 1; *Hally v. Tipping*, 3 Wils. 61; *Mayfield v. Davison*, 10 B. & Cres. 223.

(*l*) See *Hetherington v. Goulding*, 7 T. R. 80; *De la Cour v. Read*, 2 H. Bl. 278; *King v. Sheffington*, 25 January, 1833.

(*m*) See the cases *ante*, 101. But in the Court of Common Pleas the practice seems different, see *Manesty v. Stevens*, 9 Bing. 400, *ante*, 101, *n.* (*r*).

(*n*) 2 Saund. 72*a*.

(*o*) *Hetherington v. Goulding*, 7 T. R.

80.

(*p*) *De la Cour v. Read*, 2 H. Bl. 278.

(*q*) See *Grindall v. Smith*, 1 M. & P. 24; *Christie v. Walker*, 1 Bing. 68.

(*r*) *Leet v. Kibblewhite*, 6 Taunt. 483. See *Gent v. Abbott*, 8 Id. 304.

(*s*) *Thompson v. Macerone*, 4 D. & R. 619, 3 B. & Cres. 1, S. C.; and see *post*, 427.

(*t*) *Gray v. Harvey*, 1 Dowl. P. C. 114.

(*u*) — *v. Remels*, 1 Chit. Rep. 659.

(*x*) *Clark v. Baker*, 13 East, 273.

(*y*) *Forbes v. Phillips*, 2 New Rep. 98; and see *ante*, 90, 102, 190.

bail were discharged (z), but this practice was put an end to by *R. H. 2 W. 4, r. 40.*

An objection on this ground must be made at the earliest opportunity. Where an application to exonerate the bail, on this ground, was made after time to plead given, it was holden to be too late (a).

*By other causes.*] If the plaintiff do not declare within the time limited for that purpose by the practice of the Court, the bail are discharged (b). If the cause be referred to arbitration, the bail are thereby discharged, unless a verdict be taken for the plaintiff's security (c). Or if a judgment be not obtained against the principal, or if the principal pay the debt and costs, the bail, of course, are discharged. So, where the defendant was holden to bail on the money counts, and the plaintiff did not afterwards recover on them, but recovered for the substantive cause of action, for which the defendant could not have been holden to bail without a Judge's order, the Court of Common Pleas ordered an *exoneretur* (d). So, if the principal (or where there are two defendants, then if both) be taken on the *ca. sa.* (e); or if the plaintiff, instead of suing out a *ca. sa.* against the principal, sue out an *elegit* and extend lands under it, or sue out a *fi. fa.* and levy the whole amount of his debt under it (f), the bail are thereby discharged. Also, although bail be liable as long as their names continue on the bail piece, (see *ante*, 416), yet if they have not justified, they may have their names struck out of the bail piece, upon application to the Court; and afterwards, if any proceedings have been had against them, the Court will stay them upon payment of costs. (*Ante*, 416) (g).

If the defendant become a peer (h), or a member of the House of Commons (i), pending the action, the Court will allow an *exoneretur* to be entered. (See *ante*, 65, 66). And this was allowed although a *cognovit* had been given, with the express consent of the bail, and the plaintiff, had he not taken the *cognovit*, might have compelled a render before the defendant acquired the privilege (j). So, if the defendant be actually on board a convict ship, in order to be transported; or a seaman, and impressed into the king's service; or an alien, and be sent out of the kingdom under the alien act; or if, from any other act or law of our own state, it become impossible to render the defendant; the Court will allow an *exoneretur* to be entered on the bail piece. (*Ante*, 419, 420). But in the case of an alien, the bail must state in their affidavit upon which the application is grounded, that they are not indemnified, and have no money in their hands sufficient

(z) *Yates v. Plaston*, 3 Lev. 235, 245; *R. E.* 2 G. 2.

(a) *Knight v. Dorsey*, 1 B. & B. 48, 3 Moore, 303, S. C.

(b) See *Sykes v. Hammons*, 2 New Rep. 404.

(c) 2 Saund. 72 b; and see *Archey v. Hale*, 1 M. & P. 285, 4 Bingh. 464, S. C.

(d) *Cannell v. Coare*, 2 Taunt. 107; and see *Wheeler v. Jutting*, 1 Moore, 51, 7 Taunt. 314, S. C.; *Thompson v. Macerone*, 4 D. & R. 619, 3 B. & C. 1, S. C.; *ante*, 426.

(e) *Cro. Jac.* 230; *Gea v. Fane*, 1 Lev. 235.

(f) *MS. E.* 1820; and see 2 Sellon, 44; *Guthrie v. Hackwell*, 2 Lutw. 1273; *Stevenson v. Roche*, 9 B. & C. 707; *post*, 430, 435.

(g) *Say*, 109; *Humphry v. Letts*, 4 Bur. 2107; *James v. Tub*, 1 Wils. 337; *Say*, 58.

(h) *Trinder v. Shirley*, 1 Doug. 45.

(i) See *Langridge v. Flood*, 4 East. 190; *Phillips v. Wellesley*, 1 Dowl. P. C. 9.

(j) *Phillips v. Wellesley*, 1 Dowl. P. C. 9.

to answer the plaintiff's demands (*k*). And where the bail, in such a case, defended the action, and after verdict applied for an *exoneretur*, upon their paying 1000*l*. (the sum recovered by the verdict) which had been deposited with them as a security by the defendant, the Court held that they should also pay the costs of the action (*l*). But the Court will not allow an *exoneretur* to be entered, where the defendant is merely detained by a foreign enemy (*m*);<sup>2</sup> or has become a lunatic (*n*); or where the plaintiff recovers under a bailable amount (*o*).

Any indulgence shewn by the plaintiff to the principal without the consent of the bail, which puts them in a different situation from that in which they placed themselves by entering into the recognizance, would discharge their liability. Thus:

A *cognovit* by the principal, by the terms of which he is to have a longer time for the payment of the debt and costs than he could have had if the plaintiff had proceeded regularly in the action, will discharge the bail, if the bail have had no notice of it, or did not consent thereto (*p*). And this, as well in the case of bail to the sheriff, as of bail above (*q*). But a *cognovit*, by the principal, by which such time is not given, (as, if it be agreed that judgment is to be entered up immediately, or that the debt is to be paid by instalments, within the time in which the plaintiff would have been entitled to judgment and execution, had he gone to trial in the original action), will not discharge the bail though taken without their knowledge or consent (*r*). Where the plaintiff, with the consent of the bail to the sheriff, took a *cognovit*, with a stay of execution for a month, it was held that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the *cognovit* was unsatisfied (*s*). So, if without notice to the bail, the plaintiff take the joint bills of the defendant and another person for his debt and costs (*t*), or agree to take a composition for his debt and costs (*u*), the bail are thereby discharged. But a mere honorary obligation on the part of the plaintiff not to press a defendant for payment of debt and costs, will not discharge the bail (*v*). The Court of Common Pleas have refused to allow an *exoneretur* to be entered, merely because a court of equity had stayed the proceedings in the action by injunction, but said that the bail might again apply if any proceedings were taken against them (*x*); and the same,

(*k*) *Merrick v. Faucher*, 6 T. R. 50, 52.

(*l*) *Coles v. De Hayne*, 6 T. R. 246.

(*m*) See *Grant v. Fagan*, 4 East, 189.

(*n*) *Ibbotson v. Gahway*, Lord, 6 T. R. 133; Loft, 617; and see *Cock v. Bell*, 13 East, 355.

(*o*) See *Thwaites v. Piper*, 4 D. & R. 194; see vide *Tidd*, 294.

(*p*) *Thomas v. Young*, 15 East, 617; *Boscfield v. Turner*, 4 Taunt. 456; *Cruft v. Johnson*, 5 Id. 319; *Charlton v. Morris*, 6 Bingh. 427, 4 M. & P. 114, S. C.

(*q*) *Farmer v. Thoirley*, 4 B. & Ald. 91; *Clift v. Gye*, 9 B. & C. 422; ante, 144.

(*r*) *Stevenson v. Roche*, 9 B. & C. 707; *Ladbroke v. Hewitt*, 1 Dowl. P. C. 488.

(*s*) *Clift v. Gye*, 9 B. & C. 422; and see *Charlton v. Harris*, 6 Bingh. 427, 4 M. & P. 114, S. C.

(*t*) *Willson v. Whittaker*, 7 Taunt. 53. After, if agreed that the plaintiff may still proceed in the action, notwithstanding the bills; *Melville v. Glendinning*, 7 Taunt. 126.

(*u*) *Semb. Thackeray v. Whittaker*, 8 Taunt. 28, 1 Moore, 457, S. C. See *Brickwood v. Annis*, 5 Taunt. 614, 1 Marsh. 250, S. C., where the composition was taken after the judgment against the bail.

(*v*) *Ladbroke v. Hewitt*, 1 Dowl. P. C. 488.

(*x*) *Horsley v. Walstab*, 7 Taunt. 235.

where the application was made on the ground of the plaintiff's having proceeded in equity by bill for discovery and relief for the same cause (y).

Upon an affidavit before trial, that one of the bail is a material witness for you in the cause, the Court, upon application, will grant a rule that his name be struck out of the bail piece, upon your adding and justifying another in his stead (x); or the bail may be made a competent witness, by the defendant's depositing in the hands of the officer of the Court a sum equal to the sum sworn to, and the costs of the action, and the Judge will then make an order for striking his name off the bail piece (a).

*Exoneretur, when to be entered.*] After an *exoneretur* has been ordered to be entered, any proceedings against the bail, even before the *exoneretur* is actually entered, will be irregular (b).

### 3. Proceedings against Bail to the Action.

*Ca. sa. against the principal.*] A writ of *ca. sa.* against the principal must be sued out and returned, before any proceedings can be had against the bail (c); for the bail are not bound to render their principal, until they know, from the species of execution the plaintiff may think proper to adopt, whether he intends to proceed against the person of their principal or not. And for the purpose of affording the bail this information, the writ must be entered in the book (d) kept in the sheriff's office for that purpose, otherwise the Court will set aside any proceedings that may be had against the bail (e). In strictness, also, the *ca. sa.* should be filed with the *custos brevium* as soon as it is returned; but in practice this is seldom done; and it seems that if filed at any time before replication to a plea of *no ca. sa.*, it will be sufficient (f). If no *ca. sa.* be actually sued out and returned, and an action of debt or *scire facias* be brought against the bail, the bail may plead this matter; but the Court, it seems, will not quash the *sri. fa.*, or stay the proceedings on motion. (*R. E.* 5 G. 2, r. 3) (g).

The *ca. sa.* must be directed to the sheriff of the county where the venue was laid. We have already noticed, *ante*, 378, as to when it may be tested. If a defendant consents that a plaintiff shall have judgment as of a term previous to the trial, the *ca. sa.* may be tested as of that previous term (h). It must have eight days at least between the *teste* and return (i). It is questionable whether the writ,

(y) *Murphy v. Cadell*, 2 B. & P. 137.

(z) *Young v. Wood*, Barnes, 69; *R. E.* 5 G. 2, r. 1, (h).

(a) *Baillie v. Hole*, 1 M. & M. 209, 3 C. & P. 560, S. C.

(b) *Rond v. Isaac*, 1 Bur. 444.

(c) See *Thackray v. Harris*, 1 B. & Ald. 212.

(d) The Court will not take judicial notice of this book. *Russell v. Dixon*, 6 Bingh. 442, 4 M. & P. 196, S. C.

(e) *Hutton v. Reuben*, 5 M. & Sel. 323, 2 Chit. Rep. 162, S. C.

(f) 2 Sellon, 46. See *Hunt v. Cor*,

3 Bur. 1360, 1 W. Bl. 303, S. C.; *Rawlinson v. Gunston*, 6 T. R. 284, and *ante*, 384.

(g) *Philpot v. Manuel*, 5 D. & R. 615.

(h) *Haverden v. Crowther*, 1 Drwl. P. C. 170.

(i) This is submitted as the practice in actions commenced by the new process prescribed by the 2 W. 4, c. 36. The *ca. sa.* must have been so returnable if the original action were by bill; or, if the action were by original, the *ca. sa.* must have been returnable on a general return day, and have had 15

where it is not intended to be *executed*, (as is generally the case, when you are desirous of fixing the bail), can be made returnable "immediately after the execution thereof," or on any particular day out of term, as may be done in other cases by virtue of the 3 & 4 W. 4, c. 67, s. 2 (*ante*, 378). If, however, there be any thing irregular in the writ in these respects, the principal only, and not the bail, can take advantage of it (*k*). So, if the *ca. sa.* be not sued out within a year after the signing of the judgment, the judgment should first be revived by *scire facias*, before any proceedings are had against the bail; yet the bail cannot take advantage of any irregularity in this respect (*k*). So, if there be any irregularity in the judgment against the principal, the bail cannot make it the subject of objection (*l*). But if there be any irregularity in the proceedings against the bail, if, for instance, there be any irregularity in the *teste* of the *sri. fa. (m)*, the bail may of course take advantage of it. See further as to the form of the writ, the mode of suing it out, &c., *ante*, 409, 410.

The *ca. sa.* must lie the four last days before the return (exclusive of the day of lodging it and the return day) in the sheriff's office, (*R. E.* 5 G. 2, r. 3) (*n*), otherwise the proceedings will be irregular (*o*). The days must be searching days, and Sunday, or any other non-judicial day (*p*), is not reckoned, even although it be not the last day of the four (*q*). And in London and Middlesex, the *ca. sa.* must also be entered the same number of four clear days in the public book kept at the sheriff's office for that purpose (*r*). An entry in the private book will not do (*s*).

The sheriff returns *non est inventus* as a matter of course, without making any attempt to arrest the defendant; the *ca. sa.* being intended merely as a notice to the bail of the plaintiff's intention to proceed against them (*t*). But if the defendant happen to be in the sheriff's custody at the time, even although at the suit of another person, he cannot return *non est inventus*; or, if he do, the subsequent proceedings against the bail in such a case will be set aside (*u*).

This writ, we have seen (*ante*, 338), must not be sued out pending a writ of error brought upon the judgment in the original action, otherwise the Court will set aside the proceedings. Or if the writ of error be to the House of Lords, the suing out the *ca. sa.* or proceeding against the bail, would be punishable by the House as a contempt (*x*).

days at least between the *teste* and return. *R. H.* 2 W. 4, r. 77; *R. E.* 5 G. 2, r. 3 (*a*). See 13 C. 2, c. 3, s. 7; *Bell v. Mann*, *Executors of Russell*, 2 L. Raym. 1177; 2 Saund. 72 b.

(*k*) *Cholmondeley v. Bealing*, 2 Ld. Raym. 1096, 6 Mod. 304, Holt, 90, S. C.; *Campbell v. Cumming*, 2 Bur. 1187.

(*l*) *Haycard v. Ribbans*, 4 East, 310.

(*m*) *Gascier v. Jolley*, 1 H. Bl. 74.

(*n*) *Anon.* 2 Salk. 392.

(*o*) *Cock v. Brockhurst*, 13 East, 588; *Furnell v. Smith*, 7 B. & C. 693; *Wilson v. Farr*, 4 B. & Ald. 437.

(*p*) *Scott v. Larkin*, 7 Bingh. 109, 4 M. & P. 478, 1 Dowl. P. C. 200, S. C.;

7 B. & C. 800; 1 D. & R. 50.

(*q*) *Hoccard v. Smith*, 1 B. & Ald. 528; *Goodwin v. Ligar*, 6 M. & Sel. 133, 2 Chit. Rep. 192, S. C.; *Furnell v. Smith*, 7 B. & C. 693; 7 Bingh. 109.

(*r*) *R. H.* 2 W. 4, r. 77; 5 M. & Sel. 323; 2 Chit. Rep. 102.

(*s*) *Hutton v. Reuben*, 5 M. & Sel. 323, 2 Chit. 102, S. C.; *combi. aliter* in *Exchequer*, 1 M. & Y. 483.

(*t*) *Hunt v. Cox*, 3 Bur. 1360.

(*u*) *Burke v. Main*, 16 East, 2; *Ward v. Brumfit*, 2 M. & S. 238; *Briggs v. Richardson*, 2 Dowl. P. C. 158; and see *Forseyth v. Marryatt*, 1 New Rep. 251.

(*x*) 1 P. Wms. 685.

After levying a part of the sum recovered under a *fi. fa.*, a *ca. sa.* may be issued for the residue, so as to fix bail (y).

If, after the *ca. sa.* is returned *non est inventus*, the bail render the defendant, and the defendant be again bailed, there must be another *ca. sa.* to fix the new bail (z).

*Entry of the recognizance on the roll.*] After the *ca. sa.* has been returned and filed, the next steps requisite are, to file the bail piece (if not already done, see *ante*, 174), and to enter the recognizance on the roll, and carry in and docket it. In strictness, the roll should be carried in before any proceedings are had against the bail; but as the bail can take advantage of an omission in this respect, only by plea of *nul tiel record*, it is seldom in practice made up and carried in until the bail are called upon to plead (a).

The entry is made and the roll carried in and docketed by the plaintiff's attorney. *Get a roll of the term in which, or if the recognizance was entered into in vacation of the term preceding which, the recognizance was entered into, as directed ante, 222, and get a number for it from the clerk of the treasury; pay him 4s. 8d. Then enter the recognizance, &c., upon it, (see the form, Chit. Forms, 313). Then let your entry be docketed, and your roll carried in and filed in the treasury, as directed ante, 223 (c).*

*Scire facias.*] The plaintiff has the option of proceeding against the bail, either by *scire facias* or action of debt.

The *scire facias* states the recognizance, the judgment, and that the principal has not paid the damages, &c., nor rendered himself, and then commands the sheriff to make known to the bail that they be at Westminster &c., on &c., to shew &c. (d). It is not necessary to have a separate *sci. fa.* against each of the bail (e); but if you have a joint *scire facias* against both of the bail, you must bring them both into court before declaring against either (f). And in a late case, where a plaintiff issued a joint *scire facias* against A. and B., bail of C. and D., upon which A. only was summoned, B. was not found, and A. entered an appearance for himself only, it was held, that a declaration against A. alone was irregular (f).

The *sci. fa.* may be sued out and tested on the return day of the *ca. sa.* (g), but not before. It is not absolutely requisite, that it should

(y) *Stevenson v. Roche*, 9 B. & Cres. 707.

(z) *Thackray v. Harris*, 1 B. & Ald. 212.

(a) 2 Sellon, 45, 1000; 2 Saund. 72 b.

(c) See the form of the docket paper, Chit. Forms, 315. When the action was by original, the recognizance was entered on the roll by the filacer, and it was his duty to docket it and carry in the roll. The roll must however have been intitled of the term in which the process upon which the defendant was arrested, was returnable; in other respects the title was the same as where

the action was by bill. The roll then commenced with a recital of the *captias*, *alias*, &c.; then followed the plaintiff's appearance, and the defendant's appearance and defence; and lastly the entry of the recognizance. See the form, Arch. Forms, 252. The entry of the recognizance by bill was different, see *Id.*

(d) See the form, Chit. Forms, 315, and of an *alias sci. fa.* *Id.* 316.

(e) 2 Saund. 72 b, c.

(f) *Sainsbury v. Pringle*, 10 B. & Cres. 751.

(g) *Sandland v. Claridge*, 2 Dowl. P. C. 115, 1 C. & M. 672, 5 C.

be tested on that day (*h*). It must be returnable on a day certain in term (*i*); and if it be intended to have only one writ, there need be only four days exclusive between the *teste* and return, though it is usual now to allow a longer time, where you cannot summon the bail, but merely give them notice of the writ (*k*): but if there be an *alias*, then there must be fifteen days between the *teste* of the first writ, and the return of the *alias* (*l*), without regard being had to the number of days between the *teste* and return of each (*m*). The *alias sci. fa.*, also, if issued, should be tested on the return day of the first *scire facias* (*n*).

The *scire facias* upon a recognizance of bail must be brought in Middlesex, where the record is, and not elsewhere; (*R. H. 2 W. 4, r. 80*); for although the recognizance may probably have been taken at the Judge's chambers, or before a commissioner in the country, yet the course of the Court is to enter it as taken in Court, the recognizance not being obligatory by the caption, but by its being entered of record; and this is now the practice on a recognizance taken in the Common Pleas, though it was formerly otherwise in that Court (*Id.*) (*o*).

As to the manner of suing out and proceeding upon a *scire facias* in general, see *Vol. 2, Book 3, Part 1, Chap. 3*.

It should here be observed, that in this Court, before the rule of *H. T. 2 W. 4, r. 81*, after the sheriff's return of *nihil* to a *scire facias*, the plaintiff sued out an *alias scire facias*, and if such *alias sci. fa.* was left in the sheriff's office, in time to allow it to lie there the last four days before the return (*p*), (which four days were reckoned exclusive of the day on which it is left, and of the return day) (*q*): and the sheriff returned *nihil*, and the bail or the defendant did not appear, judgment was given against them, two *nihil*s being deemed equivalent to a *sci. fa.*; and it was not necessary to give notice to the bail, who were bound to watch the sheriff's office. But by the above rule of *H. T.*, no judgment shall be signed for non-appearance to a *scire facias*, without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave,

(*h*) *Stewart v. Smith*, 2 *Ld. Raym.* 1507, 2 *Str.* 868, *S. C.*

(*i*) *Edon v. Wills*, 2 *Ld. Raym.* 1417; *R. E. 5 G. 2 (a)*.

(*k*) *Holl v. Jackson*, 4 *T. R.* 663.

(*l*) *Anon.* 7 *Mod.* 40; *Anon.* 2 *Salk.* 309.

(*m*) *Elliot v. Smith*, 2 *Str.* 1130; *Combe v. Cuttill*, 3 *Bing.* 162; 2 *Sellon*, 53.

(*n*) *Goodwin v. Peck*, 2 *Salk.* 509, *Comyns*, 53, *S. C.*; *Anon.* 6 *Mod.* 81; *R. T. 8 W. 3, (a)*. When the proceedings by original writ in personal actions were in existence, the *scire facias* therein should have been tested on the *quarto die post* of the return of the *ca. su.*, (*Stewart v. Smith*, 2 *Str.* 868), and made returnable on a general return day, wheresoever, &c.; (2 *Ld. P. R.* 499; *Edon v. Wills*, 2 *Ld. Raym.* 1417); and must have had 15 days between the

*teste* and return; (*R. T. 8 W. 3, r. 1 (a)*; *E. 5 G. 2, r. 3 (a)*); or if there were an *alias*, then 15 days between the *teste* and return of each writ. (*Id. ib.*) The *alias* must have been tested on the *quarto die post* of the return of the first *sci. fa.*

(*o*) 2 *Saund.* 72 *r.*

(*p*) *Forty v. Hermer*, 4 *T. R.* 583. See *Vol. 2, p. 612*.

(*q*) *Wilson v. Farr*, 4 *B. & Ald.* 537. The four days must be searching days, and a Sunday cannot be reckoned as one of them; (*Farnell v. Smith*, 7 *B. & Cress.* 683; *Goodwin v. Luger*, 6 *M. & Sel.* 153, 2 *Chit. Rep.* 192, *S. C.*); nor can a *dies non* (*Scott v. Larkin*, 7 *Bing.* 109, 1 *Dowl. P. C.* 202, *S. C.*). The sheriff is bound to indorse on every writ of *scire facias* the day when it was left in his office. (*R. E. 5 G. 2; Tidd*, 1195).

after eight days from the return of *one scire facias*. The object of this rule is to make it the plaintiff's duty to give notice of the *scire facias* to the bail, by *summons* if the bail reside in Middlesex, or, by *notice* if they reside elsewhere; and, if neither of these things can be done, the plaintiff must shew by *affidavit*, that he has attempted to summon the bail, or give them notice, and shew what endeavours he has made for that purpose, otherwise he cannot obtain judgment for defendant's non-appearance (s). And the Court of Exchequer have refused to allow the plaintiff to sign judgment upon the sheriff's return of *nihil* to a *scire facias* against bail, without an affidavit that the bail had had notice of the *scire facias* being lodged at the sheriff's office (t). And they have refused it, although one of the bail residing in Middlesex was summoned, the other, who was resident out of that county, not having had notice of the *sci. fa.* (v).

When you do *summon* the bail, (and which can only be when they reside in Middlesex), then, in order to fix them and get a judgment, you should *personally serve them with summonses, at any time before the rising of the Court on the return day*: and they may be so personally summoned as late as possible, just before the rising of the Court, and so as to preclude the possibility of their afterwards rendering the defendant before such rising (w). It seems to be still necessary, whether you actually summon the bail or not, that the *scire facias* should be left in the sheriff's office the four clear searching days before the return, as heretofore. (See post, Vol. 2, 612).

If you cannot summon the bail, then, after having left the *ca. sa.* and *scire facias* in the sheriff's office, *prepare a notice (x), stating the issuing of the ca. sa. and scire facias, and when they were left at the sheriff's office, and the purpose for which they were left. Serve, or use your best endeavours to serve, the notice as long a time as possible before the return day. Get the sheriff to return nihil to the sci. fa. Make an affidavit of the facts, and at the expiration of eight days from the return of the nihil, apply to the Court or a Judge for leave to sign judgment. Such application ought to be made in a reasonable time after the expiration of the eight days from the return (y). The rule to enter up the judgment, if granted, is absolute in the first instance. If a Judge's order has been improperly obtained, allowing a judgment to be signed on a scire facias, where the bail have not been summoned or had notice of the proceedings, they should apply to the Court to set aside the order, or they will not be allowed to impeach it on a motion by them to set aside the proceedings (z).*

Before judgment against the bail on the *scire facias* can be signed,

(s) *Per Patterson, J.*, K. B. 6 June, 1832; *Jervis's Rules*, 2 ed. 117 n.; *Higgins v. Wilkes*, 12 June, 1832, K. B., MS., 1 Dowl. P. C. 447, S. C. *Winmill v. Cooke*, 2 Dowl. P. C. 173. See as to the endeavour he must make to serve a writ of summons in order to obtain a *distingas*, post, 439.

(t) *Luchwood v. Orme*, 5 June, 1832; *Jervis's Rules*, 87, n.

(v) *Newton v. Manoeil*, 2 C. & J. 635.

and see *Newton v. Flight*, *Jervis's Rules*, 189, n.

(w) *Wright v. Page*, 2 Bla. Rep. 837; *Clarke v. Bradshaw*, 1 East, 46; *Lewis v. Pine*, 2 Dowl. P. C. 133; *Smith v. Crane*, 8 Moore, 8.

(x) See the form, *Chit. Forms*, 318.

(y) *Wood v. Mosley*, 1 Dowl. P. C. 513.

(z) *Ludbrook v. Hewitt*, 1 Dowl. P. C. 438.



there must be a rule to appear (a). A notice in writing to the plaintiff, or his attorney or agent, will be a sufficient appearance. (*R. II. 2 W. 4, r. 82; post, Vol. 2, 614*).

To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out. (*R. II. 2 W. 4, r. 84*).

*Debt.*] The plaintiff has the option of bringing one action against both of the bail, or separate actions against each (b); and the latter of course should be adopted, where it is doubtful if one of the bail can be served with process, or there be some other good reason for suing separately. In general, however, the Court discourage the practice of bringing several actions.

Process may be sued out against the bail on the return day of the *ca. sa.* (c), or afterwards; and it may bear *teste* even before that time (d). It must be recollected, that the defendants cannot be holden to bail; (*ante*, 70); but a copy only of the process must be served on them, as in ordinary cases in nonbailable actions. It was formerly requisite that the writ should contain the following *ac etiam*:—"And also to a bill of the said plaintiff against the said defendant in a plea of debt upon recognizance, according to the custom of our Court, before us to be exhibited;" otherwise the defendant or his attorney was not obliged to receive the declaration. (*R. E. 15 G. 2*). But since the 2 W. 4, c. 39, it will suffice merely to describe the action in the writ as "an action of debt."

The *venue* must be laid in Middlesex, for the same reason as stated *ante*, 432, with respect to the *scire facias*. The rest of the proceedings in the action are the same as in ordinary cases.

*Execution.*] The execution may be by *f. fa.*, *elegit*, *levari facias*, or *ca. sa.*; and this latter writ may issue in the first instance, or after a *f. fa.*, at the plaintiff's option (e). If the proceedings against the bail have been by action of debt, and both the bail were joined, the execution must of course be against both jointly, in order to accord with the judgment (*see ante*, 376); but if by *scire facias* against both, the execution may be either jointly against both, or several against each; for the purport of the *scire facias* is, to have execution according to the form and effect of the recognizance, and the recognizance is joint and several (f).

If the plaintiff be not satisfied the amount of his debt by the execution against the bail, he may still have execution against the principal (g); unless the bail have been taken on a *ca. sa.*; in which case

(a) Chit. Sum. Prac. 307. See the form, Chit. Forms, 319. It is written on plain paper and taken to the clerk of the rules.

(b) 2 Saund. 72 b.

(c) *Somers v. Brooks*, 8 T. R. 628.

(d) *Pimero v. Wright*, 2 B. & P. 235.

(e) *Ellist v. Smith*, 2 Str. 1130; *Goodchild v. Chaucereth*, 1d. 822, 3 Salk. 386; and see *Troughton v. Clarke*, 2 Taunt.

113, 114.

(f) 2 Saund. 72 b; *Sainsbury v. Prince*, 10 B. & Cr. 751. See forms of *f. fa.* Chit. Forms, 336; of *ca. sa.* 1d. 327.

(g) *Higgin's case*, Cro. Jac. 390; *Freeman v. Executor of Freeman*, 1d. 540; *Folgate v. Mole*, 1 Sid. 107; see *Fisher v. Carruthers*, Barnes, 242.

the plaintiff is for ever after precluded from proceeding against the principal, even although the bail become bankrupt, and be discharged upon obtaining their certificate; or although the plaintiff discharge the bail upon their paying part of the debt, with an understanding that he should be at liberty to proceed against the principal for the residue (g).

If the principal be taken in execution, it seems the plaintiff cannot take the bail (h). But, after levying a part under a *fi. fa.*, a *ca. sa.* for the residue may be issued, and the bail be fixed for the residue (i).

#### 4. Bail in Error, how far liable.

The bail in error bind themselves, by their recognizance, to prosecute the writ of error with effect, and also to satisfy and pay the debt, damages, and costs, awarded by the former judgment, and also the costs and damages to be awarded for the delaying of execution, if the said former judgment should be affirmed. (3 J. 1, c. 8; *see ante*, 342, 345). Therefore, if the judgment be affirmed, or the writ of error be discontinued, or the plaintiff nonprossed (even before the record has been certified) (k), the bail are liable. As to the extent of their liability, it must be observed, that the words "costs and damages to be awarded for the delaying of execution," must be understood to mean such damages and costs as are given by the Court of error; therefore the bail are liable only for the amount of the judgment given by the Court of error, and for interest on that sum from the time of affirmance; but not to any interest previous to the affirmance, except such as is included in the judgment in error (l).

As the engagement of the bail in this case is absolute, to pay the debt, &c., if judgment should be affirmed, &c., they cannot be discharged of their responsibility by the rendering of the principal (m), or by his bankruptcy and certificate (n), or even if the principal be taken upon a *ca. sa.* for the same debt and damages and costs in error (o). So, if the bail themselves become bankrupt before affirmance, their certificate will be no bar to proceedings against them on their recognizance (p). Bail in error, however, who do not justify, may have their names struck out of the bail piece, upon application to the Court (q); after which, of course, no proceedings can be had against them. But whilst their names remain on the bail piece, they may be proceeded against; and the Court will not stay such proceedings, but upon payment of costs (r). And in a late case, where the plaintiff in error nonprossed his writ, after the bail were excepted to, and notice

(g) *Allen v. Snow*, 2 M. & S. 341.

(h) *Higgin's case*, 6 To. Jac. 320; but see *Antree v. Palfreman*, T. Jones, 75; *Perkins v. Pettit*, 2 B. & P. 440.

(i) *Sterrenan v. Roche*, 9 B. & C. 707.

(k) *Roe v. Whitehead*, Barnes, 410; *Dickenson v. Hewelline*, 2 M. & S. 210.

(l) *Frith v. Lervous*, 2 T. R. 57, 2 Doug. 753, S. C.; see *Doe v. Reynolds*,

1 M. & S. 247.

(m) *Leff*, 238; *Southcote v. Brathwaite*, 1 T. R. 624.

(n) *Id.*

(o) *Perkins v. Pettit*, 2 B. & P. 440.

(p) *Huckley v. Merry*, 2 Str. 1043.

(q) *Jones v. Tub*, 1 Wils. 337, Bay. 58, S. C. *ante*, 240.

(r) *Gould v. Holmstrom*, 7 East, 580.

given of justifying the same bail, but before they justified, and the defendant then sued the bail on their recognizance; the Court refused to allow an *exoneretur* to be entered (*s*).

### 5. Proceedings against Bail in Error.

It is not necessary to sue out *ex ca. sa.* against the principal, in order to proceed against the bail in error, as it is in the case of proceeding against bail to the action. The recognizance, however, must be entered, and the roll carried in and docketed, in the manner mentioned *ante*, 431 (*t*).

*Scire facias.*] The defendant in error has his option to proceed against the bail either by *scire facias* or action of debt, in the same manner as the plaintiff may against bail to the action. (*See ante*, 431). The *scire facias* in this case is tested and made returnable, as mentioned *ante*, 431, 432 (*u*). The *scire facias* must be brought in Middlesex, whether the recognizance were taken in Court or at a Judge's chambers. (*R. II. 2 W. 4, reg. 80*). It is necessary to observe, that, if the plaintiff in error have joined in the recognizance (which, however, is not usual), the *scire facias* must be either against him and both of the bail, or against each of them severally; for, if it be brought against two of them only, it will be bad on demurrer (*x*).

As to the mode of suing out the *sci. fu.*, and proceeding on it, see *Vol. 2, Book 3, Part 1, Chap. 3*. And for other matters relating to the writ, see *ante*, 432, 433.

*Debt.*] The proceedings in this action are the same as in debt against bail to the action. (*See ante*, 434). The venue must be laid in Middlesex.

If the recognizance were entered into by the principal as well as the bail, the action must be brought against all three, if living, or against each separately; if brought against two only, the defendants may plead the matter in abatement, but cannot demur (*y*).

As to execution, see *ante*, 434 (*z*).

(*s*) *Dickenson v. Heseltine*, 2 M. & S. 210.

(*t*) See the forms, Chit. Forms.

(*u*) Id.

(*x*) 2 Saund. 72 c.

(*y*) 1 Saund. 291, (n. 1); 2 Saund. 72 c.

(*z*) See as to the forms, Chit. Forms

## SECT. 6.

*Entry of Satisfaction on the Roll. Setting off Costs, &c.*

As soon as the judgment is satisfied, by payment, levy, or otherwise, the plaintiff, if required, must give the defendant a warrant directed to some attorney of this Court, authorizing him to enter up satisfaction on the roll. This warrant must be upon a 20s. stamp, and may be had at the stationer's; *Fill it up (a), and get it executed in the same manner as any other warrant of attorney. Next, make out a satisfaction piece upon a piece of unstamped parchment, like a bail piece (b), and take it and the warrant to the clerk of the judgments, who will enter the same in his book of remembrances, and hand the satisfaction piece over to the clerk of the treasury, for the purpose of being entered on the roll. Pay for the entry 3s. in term, 5s. in vacation, 10d. for the keys of the treasury, and 3s. 4d. for attendance (c).*

Where there are cross actions, the Court, upon application, will allow the defendant in one action to enter up satisfaction on the roll, upon his acknowledging satisfaction for the same amount in the other action, in which he had obtained judgment for a larger sum; and this, even although he have the other party in custody in execution on the latter judgment (*d*), the other party's attorney being first satisfied his lien upon the judgment for his costs in that particular suit. (*See ante*, 54) (*e*). So, where a bill in equity was dismissed with costs, and the plaintiff brought an action in this Court for the same cause and recovered, the Court, upon application of the defendant, ordered that the costs in equity should be set off against the damages and costs in law, the lien of the plaintiff's attorney being first satisfied (*f*). And the same where the rights of the parties arise from separate awards (*g*), or it should seem where the right of one arises from an action of the other from an award. Even where the costs on one side were costs incurred in the Mayor's court in London (*h*), or the costs of an indictment (*i*), the Court of Common Pleas have allowed them to be set off.

And it is not necessary that the two proceedings in which the costs, &c. have been incurred, should be between exactly the same parties, as in the case of a set off under the statute; where B. brought an action against A., and recovered, and A. brought an action against B. and C., and recovered, the Court, upon the application of A.,

(a) See the form, Chit. Forms.

(b) Id.

(c) See form of entry on the roll, Chit. Forms.

(d) *Simpson v. Hanley*, 1 M. & S. 696.

(e) *Middleton v. Hill*, 1 M. & S. 240, Tidd, 339.

(f) *Harrison v. Bainbridge*, 4 D. & R. 363, 2 B. & Cres. 800, N.C.; and see *Hall v. Ody*, 2 B. & P. 28; *Emdin v. Darley*, 1 New Rep. 22; *Webber v. Nicholas*, 4 Bingham. 16.

(g) M.S. E. 1814.

(h) *Emmerson v. Laskley*, 2 H. Bl. 253.

(i) *Emdin v. Darley*, 1 New Rep. 22.

allowed him to set off the damages and costs recovered by him in his action against B. and C., against the damages and costs recovered by B. in his action against him, subject to the lien of B.'s attorney (*k*). So, where A. brought an action against B., which was defended at the joint expense of C. and D., (they being the parties really interested,) and A. was nonsuited; and C. brought an action against A., and was nonsuited: the Court, upon the application of C., allowed him to set off the costs of the first nonsuit against the costs of the second (*l*). So, where upon two policies of insurance, underwritten by the same persons for A., two sets of actions were brought, and each set was consolidated; and A., the plaintiff, was entitled to costs in one, and had to pay costs in the other; the Court allowed the costs in the latter action to be set off against the costs in the former, as in substance, under the consolidation rule, the same persons were the defendants in both, although in form one action appeared to be against B., and the other against C. (*m*). But the Court have refused to allow the damages and costs in an action by A. against B. and C. to be set off against damages and costs recovered by the assignees of B. against A. (*n*). The costs of a judgment as in case of a nonsuit, entered up against the plaintiff after he has become bankrupt, cannot be set off against the costs of an action by the bankrupt's assignees against the defendant in the former action (*o*). Nor will the Court allow costs to which a party may probably be entitled in one action, to be set off against costs to which he is not absolutely liable in another (*p*). Where the plaintiff sued out a *fi. fa.* against E.'s effects, E. having previously assigned all his effects to trustees for the benefit of his creditors, the sheriff, under an indemnity from the trustees, returned *nulla bona*; the plaintiff sued the sheriff for a false return, and the sheriff obtained a verdict; the Court refused to allow the plaintiff's judgment to be set off against the costs of the action against the sheriff (*q*).

Where costs accrue to each party in the *same* cause, as, for instance, to one upon some interlocutory proceeding, and to the other upon verdict, the Court will allow the costs in the one case to be set off against the costs, &c. in the other; and without satisfying the attorney's lien, for the attorney has a lien only on the balance which is ultimately to be paid to his client in that particular suit. (*See ante*, 55) (*r*). But in an action against two, if the plaintiff succeed against one, and fail as against the other, he will not be allowed or compelled to set off his damages and costs against the costs of the defendant who succeeded. Yet, in a case where an action of trespass was brought against three, and two of them allowed judgment to go by default,

(*k*) *Mitchell v. Oakfield*, 4 T. R. 123; and see *Gilchrist v. Heaver*, 8 T. R. 61.

(*l*) *O'Connor v. Murphy*, 1 H. Bl. 637.

(*m*) *Ninez v. Madichani*, 1 H. Bl. 217.

(*n*) *Ibb v. Darnton*, 3 East, 143.

(*o*) *Frost v. Pycc*, 10 Moore, 154, 2 Bingh. 465, S. C.

(*p*) *Masterman v. Malin*, 5 M. & P.

324, 7 Bingh. 435, 1 Dowl. P. C. 222, S. C.

(*q*) *Howell v. Pigott*, 1 Dowl. P. C. 230, 1 M. & Scott, 122, 3 Bingh. 61, S. C.

(*r*) *Stephens v. Weston*, 3 B. & Cress. 535, 5 D. & R. 393, S. C.; *Fanshau v. Burt*, 1 D. & R. 168; *Howell v. Harding*, 8 East, 362.

and the third went to trial and obtained a verdict—the Court, upon application of the third defendant, and upon affidavit that the other two had acted under his authority, compelled the plaintiff to set off the damages and costs he had recovered against the two defendants, against the costs he was liable to pay to the third (s).

Where a defendant was, by a Judge's order, allowed to proceed to trial upon payment to the plaintiff of a certain sum of money, with costs up to the date of the order, and the plaintiff consented to the trial proceeding on those terms, before the costs had been paid; the Court held that the defendant, having obtained a verdict, was bound to pay those costs, and could not set them off against the costs afterwards taxed for him on the *posita* (t). In a late case, a plaintiff, after giving notice of trial, withdrew his record, and the defendant obtained a rule for the payment of the costs of the day which were taxed; at the next assizes the plaintiff obtained a verdict, and a new trial was afterwards granted on payment of costs; the Court held that the defendant might set off the costs due to him against those payable on the rule for the new trial (u). When, by an order of *Nisi Prius*, a verdict is entered in favour of the plaintiff for nominal damages and the costs of the action, and the plaintiff is to pay the defendant a certain sum, that sum may be set off against the costs in the cause (x).

(s) *Schmale v. Noble*, 1 H. Bl. 23.

(t) *Aspinall v. Stamp*, 3 B. & Cres. 106, 4 D. & R. 716, S. C. ante, 55, n. (k).

(u) *Doe d. Dangerfield v. Allsop*, 9 B. & Cres. 760.

(x) *Newton v. Newton*, 1 M. & Scott, 366, 8 Bligh. 262, 1 Dowl. P. C. 264, S. C.; see *Phillipson v. Caldwell*, 6 Taunt. 176.

# BOOK I.

## PART II.

### PROCEEDINGS IN NONBAILABLE ACTIONS.

PREVIOUS to the statute 2 W. 4, c. 39, the process for the commencement of a personal action in this Court, where the defendant either could not be holden to bail, or the plaintiff did not wish to hold him to bail, was, either by original writ, (the process whereon was by summons, or attachment and *distringas*, or by *capias ad respondendum*), or by bill of Middlesex, (the process whereon was by *latitat*, *alias capias*, and *pluries*). Now, however, since that act, the only process for the commencement of a personal action, (except *replevin*, or other actions removed from inferior courts), against any person whatever, wherein the defendant either cannot be holden to bail, or the plaintiff does not wish to hold him to bail, is either by *writ of summons*, where the defendant can be served with the writ, or by *writ of summons* and *distringas*, where he cannot be served.

We shall divide our considerations as to the proceedings upon this writ of summons where the defendant can be served, and upon this writ of summons and *distringas* where he cannot be served, into the two following chapters, viz.

CHAP. I. *Proceedings by Writ of Summons, where the Defendant can be served with it, p. 441 to 455.*

II. *Proceedings by Writ of Summons and Distringas, where the Defendant cannot be served with the Summons, p. 455 to 462.*

## CHAPTER I.

PROCEEDINGS BY WRIT OF SUMMONS, WHERE THE DEFENDANT  
CAN BE SERVED WITH IT.

*The writ, in what cases, and by and against whom issued.*] This writ of summons is the means of commencing any personal action, (except *replevin*, or other actions removed from an inferior court), wherein you cannot, or do not wish to hold the defendant to bail; or where you do not intend to proceed against a member of parliament, according to the provisions of the bankrupt act. And it is the *only* (a) means of so commencing it, excepting in an action against *several* defendants, and wherein you intend arresting one and not the other; in which case, (as we have seen *ante*, 121), the service of a copy of the *writ of capias* upon the latter will have the same effect as the service of a writ of summons. This writ may also be the means of commencing an action for the purpose of outlawing a party, as pointed out in the second volume of this work, *Book 4, Part 1, Chap. 2*.

The writ may be issued in the above cases, by or against any person; and this "whether the action be brought against any person entitled to the privilege of peerage or of parliament, or of the Court wherein such action shall be brought, or of any other Court, or to any other privilege, or by or against any other person." (2 *W. 4, c. 39, s. 1*).

*Form of the writ.*] The statute 2 *W. 4, c. 39, s. 1*, prescribes the form of this writ of summons, and by sect. 16 enacts, that all such proceedings as are mentioned in the writ may be taken in default of defendant's appearance. The following is the form:—

*William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, To C. D., of \_\_\_\_\_, in the county of \_\_\_\_\_, Greeting.*  
*We command you, [or, as before, or, often we have commanded you,]*

(a) It has been held, that, in an action against one defendant alone, a service of the writ of *capias* in a county palatine cannot be the means of com-

mencing the action; but whether it could be so if served in another county, has not been decided. *M.S. Nov. 1833. K. B.*



that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of King's Bench, in an action on promises [or "of debt," &c. as the case may be], at the suit of A. B. And take notice, that, in default of your so doing, the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution. Witness [name of the Chief Justice], at Westminster, the day of [day of issuing the writ], in the                      year of our reign.

The following memorandum must be subscribed on the writ:—

N.B. This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

The same statute also prescribes certain indorsements to be made on the writ, but as there are other requisite indorsements, and as they form no part of the writ itself, they will be noticed more conveniently hereafter.

This statute of 2 W. 4, imperatively requires that this form should be adopted (b), and any material variation from it would not only render it irregular, but in some cases absolutely void.

We shall proceed to notice the particular parts and requisites of this writ of summons, together with the memorandum and indorsements to be made thereon;—the mode of suing it out,—how it is to be continued by subsequent writs,—and the consequences of any defects therein. The proceedings, from the defendant's appearance inclusive, until the judgment and execution, will form the sequel of this chapter.

*Direction of, and parties' names.]* It will be observed that the writ must be directed to the defendant himself, and not as formerly to any sheriff or officer.

It is proper that the writ should in general set forth the true christian and surname of the defendant in full. In actions, however, upon bills or notes or other written instruments, we have seen *ante*, 99, that the defendant's christian or first name may be designated in the process and declaration in the same way as he is designated in such bill, &c. (c). But independently of this, it seems, that in mere serviceable process, although the defendant be designated therein by a wrong christian or surname, or by no christian name, or by initials, that will not be a ground for setting it aside (d). And since the 3 & 4 W. 4. c. 42, s. 11, it seems that no material advantage whatever can be taken of the misnomer; for, although formerly the defendant might have pleaded the misnomer in abatement if the mistake was carried into the declaration, yet now by that statute "no plea in abatement for a misnomer shall be allowed in any personal action, but that, in

(b) *Smith v. Crump*, 1 Dowl. P. C. 519.

(c) The rule of H. T. 2 W. 4, r. 32, *ante*, 99, is not applicable to serviceable process.

(d) *Sargant v. Gordon*, 7 D. & R. 258; *Rolph v. Peckham*, 6 B. & C. 164, 9 D

& R. 214, S. C.; *Sumner v. Batson*, 11 Moore, 39; but query whether, since the rule of M. T. 3 W. 4, r. 10, *ante*, 110, the omission of the christian name would not be a ground for setting the writ aside.

all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a Judge's summons founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the Judge shall think fit."

If the *defendant* appear by his wrong name, the plaintiff may declare against him by that name; or if he appear by his right name, the plaintiff may declare against him thereby, stating in his declaration that he was sued by the wrong name (e). If the defendant do not appear, the *plaintiff* cannot appear for him in his *right* name, according to the statute (f), nor can he appear for him in the name by which he is sued, and afterwards declare against him in his *right* name (g). His only course would in such case be to appear for the defendant in the wrong name and declare against him by that name, which would only subject him to being compelled by the Judge's order above mentioned to amend the declaration by inserting the right name, at his costs (h).

The place and county of the *residence*, or supposed residence, of the *defendant*, or wherein the defendant is, or is supposed to be, must be mentioned in the writ and copy. This is imperatively required by the 2 W. 4, c. 39, s. 1, and if not mentioned would afford a ground for setting aside the writ, (*R. M.* 3 W. 4, r. 10; *ante*, 110), or the service of the copy, if the application for that purpose were made to the Court, or a Judge in vacation, within the eight days limited for the defendant's appearance; but the writ itself would not be void (*Id*). It is to be observed, that the insertion of the *supposed* residence will suffice, and the Court or a Judge, on such application, would not try a disputed question of residence, if the plaintiff had reasonable grounds for supposing that the residence mentioned in the writ was the correct one. The object of inserting this residence is for the purpose of having the copy of the writ served in the proper county.

A misnomer of the *plaintiff* in the writ incurs, it seems, the same trifling consequences as the misnomer of the defendant above noticed (i). In one case it was decided, that though the plaintiff declare by a wrong christian name, it is no ground of nonsuit at the trial, if it be shewn that the defendant knew that the action was brought by the person who actually sues (k).

It is wholly unnecessary, and therefore best not, in any case, whe-

(e) See *Doe v. Butcher*, 3 T. R. 611; *Hole v. Finch*, 2 Wils. 393; *Res v. Roper*, 6 M. & Sel. 327, 329.

(f) *Doe v. Butcher*, 3 T. R. 611; *Greenlade v. Rotheros*, 2 N. R. 132; *Dring v. Dickenson*, 11 East, 223.

(g) *Dring v. Dickenson*, 11 East, 225; *Delaney v. Cannon*, 10 East, 328; *Moutier v. Hertz*, 3 M. & Sel. 450.

(h) See *Smith v. Patten*, 6 Taunt.

115, 1 Marsh. 474, S. C.; *Reeves v. Slater*, 7 B. & C. 488, 1 M. & R. 265, S. C.; *Oakley v. Giles*, 3 East, 167; *Cole v. Hindson*, 6 T. R. 234, 236; *Crauford v. Satchwell*, 2 Stra. 1218.

(i) *Morley v. Law*, 2 B. & B. 34, 4 Moore, 369, S. C., and the cases *ante*, 99, n. (g).

(k) *Boughton v. Frew*, 3 Camp. 29.

ther or not the plaintiff be suing, or the defendant be sued, in *autre droit*, as executor, administrator, assignee, or the like, to describe him as such in the writ. We have seen (*ante*, 101), that this description is considered by this Court, and the Court of Exchequer, as unnecessary, even in a bailable writ, and, *a fortiori*, it is so in a nonbailable one. It should seem that if the party be thus unnecessarily described in the writ, no attention need be paid to it in declaring, unless perhaps he is described in the writ as suing or being sued "as" executor or "as" assignee, &c. (*See ante*, 102).

The addition either of the plaintiff or defendant need not be inserted in the writ.

*Number of parties.*] The names of all the plaintiffs should be inserted in the writ and no more. And by *R. M. 3 W. 4, r. 1*, the writ must contain the names of all the defendants if more than one in the action, and must not contain the names of any defendant in more actions than one. If the writ be at the suit of one plaintiff only, and the declaration at the suit of two, or *vice versa*, the Court in term, or a Judge in vacation, will set aside the declaration for irregularity, if the application were made before the usual time for pleading be expired; and so, if the writ be against one defendant, and the declaration against two. But if the writ be against two defendants, and the declaration against one, that would not, it seems, be irregular, if the plaintiff entirely dropped his proceedings against the other (*m*); and especially if the action were for a *tort* (*n*). If there be several defendants, and several writs, all the defendants should be named in each.

*Cause of action.*] It will be seen that the form of the writ of summons as prescribed by the act requires the cause of action to be concisely stated in it, as an action "on promises," "of debt," "of covenant," "of detinue," "on the case," "of trover," or "of trespass," as the case may be. Even describing the action of assumpsit as an action of "*trespass on the case upon promises*," would be bad. If the form of action be improperly described or wholly omitted, the Court in term, or a Judge in vacation, would set it aside, if the application be made within the eight days limited for the appearance. (*See R. M. 3 W. 4, r. 10, ante*, 110). If the cause of action be inserted, and there be a material variance between it and the declaration, thus, if the writ was in an action on promises and the declaration in debt, or if the writ was in an action on the case and the declaration upon promises, or the like, the Court in term, or a Judge in vacation, would set aside the declaration, if the application were made before the usual time for pleading is expired (*o*).

(m) *See Evans v. Whithead*, 2 M. & R. 367; *Bowles v. Bolton*, 2 C. & J. 474, *ante*, 180, and *R. E. 8 G. 4*.

(n) *See Wilson v. Edwards*, 3 B. & C. 734, 5 D. & R. 622, S. C.

(o) *King v. Skelington*, 25th Jan. 1833, 1 C. & M. 363, 1 Dowl. P. C. 686, S. C., and several other cases, not reported, have settled this; and see the decisions in bailable cases, *ante*, 102, 104.

*Return of.*] Formerly, all writs for the commencement of personal actions must have been made returnable in *term* time, original writs and the process thereon on a general return day, and bills of Middlesex and *latitats* on some certain day, otherwise they would have been irregular. The two latter writs might have been made returnable the very day they were sued out. Bills of Middlesex and *latitats*, as also the process on original writs, must also have been made returnable, either in the same or the next term after that in which they were tested; for if a term intervened between the *teste* and return, the writ would have been void. If the writ were returnable on a *dies non* it was considered altogether void (*p*).

Now, however, it will be seen that the writ of summons does not specify any particular return day, nor is there any particular return day, but the defendant must, within eight days after the service thereof on him, inclusive of the day of such service, enter an appearance, (as pointed out *post*, 453), whatever day the last of such eight days may happen to fall, whether in term or vacation. If, however, the last of such eight days fall on a Sunday, Christmas-day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day is to be considered as the last of such eight days; and if the last of such eight days fall on any day between the Thursday before, and the Wednesday after Easter-day, then the Wednesday after Easter-day is to be considered as the last of such eight days; and if the writ be executed on any day between the 10th of August and the 24th of October, an appearance may be entered by the defendant at the expiration of such eight days, but no declaration or pleading after declaration can be filed or delivered between the said 10th of August and 24th of October. (*See 2 W. 4, c. 39, s. 11*). It will be seen *post*, 446, that the writ is in force only, and cannot be executed after, four calendar months from the day of its date, including such day.

The writ should require the defendant to enter an appearance "in our Court of King's Bench," as in the form prescribed *ante*, 441. If however, it required him to enter it "in our Court before us," or otherwise shewed that the Court of King's Bench was meant, it would not, it seems, be defective on that account (*q*).

*Date and teste.*] The process upon an original writ, and by bill, must have always been tested on some day in term, not being Sunday. If sued out in vacation, it must have been tested as of the previous term, usually the last day of it, or it would have been void (*r*). Now, however, the writ of summons (as also any *alias* or *pluries* writ issued on it) must be dated the very day it was issued, and this whether in term or vacation. (*See 2 W. 4, c. 39, s. 12*). If

(*p*) See the several authorities establishing these positions, *ante*, 104.

(*q*) See Tidd, 9th ed. 150.

(*r*) See the cases establishing these positions, *ante*, 105.

not dated at all, or if dated on a day different from the day on which it was issued, it would be irregular (*see R. M. 3 W. 4, r. 10; ante, 110*), and might be set aside (s) by the Court or a Judge, if the application be made within the eight days' time limited for entering the appearance, and before such appearance has been entered. If by mistake a wrong King's name be inserted in the date, it is immaterial, provided the name of the Chief Justice (or, if there be no chief, of the Senior Puisne Judge) of the Court be inserted (t). It seems immaterial whether the day and year be stated in words at length or in figures. (*See ante, 105*).

The writ must not be issued until there is a complete cause of action, otherwise there would, it should seem, be a good defence to the action, or defendant might plead in abatement that the action was prematurely brought (*see ante, 105*): or in a clear undisputed case the Court would set aside the proceedings (u).

The writ of summons and *alias*, &c., must be *tested* in the name of the Chief Justice, or, if there be no chief of the Senior Puisne Judge. (*See 2 W. 4, c. 39, s. 12*). If not so, it would be irregular, and might be set aside accordingly, upon an application made within the eight days limited for defendant's entering the appearance, and before appearance. (*R. M. 3 W. 4, r. 10; ante, 110*).

*Duration of the writ.*] The writ remains in force only, and cannot be executed after, four calendar months from the date of it, including the day of such date; but if it be not served within that time it may be continued by an *alias*, and, if necessary, by a *pluries* writ, as hereafter mentioned. Though there be not eight days remaining of the four months when the writ is served, the eight days to enter an appearance must be still reckoned, as in other cases. (*2 W. 4, c. 39, s. 10*).

*Memorandum to be subscribed.*] The writ of summons, *alias*, and *pluries*, must have the formal memorandum, noticed *ante, 412*, subscribed to it, otherwise the total omission thereof might render the writ void, or any material variance therefrom would render the writ and proceedings thereon irregular (*R. M. 3 W. 4, r. 10; ante, 110*); and the same might be set aside accordingly, on an application to the Court in term, or a Judge in vacation, within the eight days limited for the appearance and before appearance.

*Indorsements on.*] The writ must be indorsed with several memoranda, or notices.

1. It must be indorsed with the *name and place of abode of the attorney* actually suing out the same, and if such attorney be not an

(s) See 1 Burr. 408.

(t) See *Erin v. Drummond*, 4 Bing. 278, 13 Moore, 533, S. C.

(u) *Lamb v. Pegg*, 1 Dowl. P. C. 447;

*Kerr v. Dick*, 2 Chlt. Rep. 11, *ante, 105*.

attorney of the Court in which the writ is sued out, then also with the name and place of abode of the attorney of such Court in whose name the writ is taken out (*w*); but if no attorney be employed for that purpose, then with a memorandum expressing that the same has been sued out by the *plaintiff in person*, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be. (2 *W.* 4, c. 39, s. 12) (*w*). Also, if the attorney suing out the writ sues out the same as *agent* for an attorney in the country, the name and place of abode of such attorney in the country must be indorsed on the writ. (*R. M.* 3 *H.* 4, r. 9). We have seen (*ante*, 29), that the attorney whose name is indorsed on the writ must, after a demand in writing made on him, declare whether the writ was sued out by his authority and also declare the name and place of the abode of his client, if ordered; for an omission of this indorsement, or any deceptive description therein, the Court in term, or a Judge in vacation, will set aside the proceedings for irregularity (*R. M.* 3 *W.* 4, r. 10) (*x*), if the application be made within the eight days limited for appearing and before appearance. But the omission would not render the writ void. (*Id.*) The form of this indorsement should be as follows:—"This writ was issued by E. F., of (if sued out as agent for an attorney in the country, here say, 'as agent for G. H., of ), attorney for the plaintiff (or plaintiffs) within named." Or if sued out by the plaintiff in person—"This writ was issued in person by the plaintiff within named, who resides at [mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be."

2. If the writ be issued for the recovery of any debt, (*R. M.* 3 *H.* 4, r. 5; *R. H.* 2 *W.* 4, reg. 2), it must be indorsed with a statement of the amount of the debt, and the amount of what the plaintiff's attorney claims, for the costs of the writ, copy, and service, and attendance to receive debt and costs; and the indorsement must also state that, upon payment thereof within four days, to the plaintiff or his attorney, further proceedings will be stayed. The defendant will be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one sixth be disallowed, the plaintiff's attorney will have to pay the costs of taxation. This indorsement must be in the following form:—"The plaintiff claims £ for debt and £ for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed." (*Id.*). It is to be observed that there is no occasion for this indorsement, where the action is not for

(*w*) If this be not complied with, the Court will only order the proceedings to be stayed until a proper attorney be appointed, though they will make the attorney, whose name is indorsed, pay the costs of the application. *Constable v. Johnson*, 1 C. & M. 184.

(*x*) And see 2 G. 2, c. 23, s. 23; *Lo Greave v. Pease*, 2 H. Bl. 690; *Chapman v. Ryall*, Barnes, 415; *Appenhein v. Harrison*, 1 Burr. 20; *Williams v. Lewis*, 1 Chit. Rep. 611. See form of demand, and Chit. Forms, 43, 44.

a debt (x). If this indorsement, when necessary, be not made or be improperly made, the Court in term, or a Judge in vacation, would set aside the proceedings for irregularity, (*R. M. 3 W. 4, r. 10, ante, 110*), on an application made within the eight days limited for the appearance, and before appearance. But the omission would not render the writ void (*Id.*). The affidavit, on such application, must state the action was for a debt (a).

3. The person serving the writ must indorse on it the day of the week and month of the service thereof; (*2 W. 4, c. 39, s. 1*); and he must do so within three days, at least, after such service, otherwise the plaintiff will not be at liberty to enter an appearance for the defendant, according to the statute *2 W. 4, c. 39, s. 2*; and it is to be observed that the affidavit upon which such appearance is to be entered, must mention the day on which such indorsement was made. (*R. M. 3 W. 4, r. 3*) (b). The following is the form of such indorsement: "*This writ was served by me, X. Y., on C. D., on the day of 1833. X. Y.*"

*How sued out.*] In order to sue out the writ of summons, prepare a *præcipe* for the office (c); also get a blank writ of summons (which may be had at the stationer's, or elsewhere), and fill it up according to the directions pointed out in the preceding pages. Take them to the signer of the writs, who will sign the writ; pay him 2s. 6d. (*R. M. 3 W. 4, r. 2*) for signing; leave the *præcipe* with him. Then take the writ to the seal office, and get it sealed; pay 7d. (*R. M. 3 W. 4, r. 2*). Indorse it with the indorsements directed *ante, 446*, excepting, of course, the indorsement of the day of service. Make a copy of it, together with these indorsements, for the purpose of serving such copy on the defendant. If there be two or more defendants, it may be requisite to have several writs, in order to enable the party or parties serving the same to swear to a service of a copy of the writ, if called upon so to do. In such case, let each writ correspond with the other. If the same person can serve all the defendants, then one writ will suffice. In either case, make copies for service on each defendant. Serve the defendant, as directed *infra*, and indorse on the writ the day of such service, as directed *supra*. If the defendant cannot be served within the four calendar months from the date of the writ, inclusive of such date, then you must sue out an alias or pluries writ of summons, as directed *post, 451*; or else, which would be most expedient, obtain a writ of distringas, as directed in the next chapter.

*Service of the writ.*] The writ is serviceable in any county in England or Wales. But it must be served in the same manner as formerly adopted in the county in which the defendant is described in the writ as residing, or within 200 yards of the border of it, and

(c) *Cutwin v. Mosley*, 1 Dowl. P. C. 438.

(a) *Id.*

(b) See form of affidavit, *Chit. Forms*, 341.

(c) See the form, *Chit. Forms*, 339.

not elsewhere. (2 W. 4, c. 39, s. 1). We have already pointed out how the writ is to be directed (*ante*, 412); also, that places, parcel of one county, and situate in another, may be deemed as part of each county, and that the writ may be served accordingly. (*Ante*, 97, 98).

If there be any dispute as to the boundaries of the county, the Court will not determine the matter upon motion (*d*). Indeed, in the affidavit in support of a motion to set aside the service of process, on account of its being served in a wrong county, it must, it seems, be expressly stated, not only that the place where the writ was served is not within the county in which the defendant is described in the writ to reside, but that it is not within 200 yards of the border thereof, or upon the confines of it (*e*), and that there is no dispute as to boundaries (*f*). But where a *latitat* was served in a wrong county, and it was sworn that the place of service was "full five miles from any part of the county" into which it issued, this was deemed a sufficient affidavit to set aside the service, without swearing as to the service not having been on the confines, or that there was no dispute as to boundaries (*g*). It cannot be served upon a defendant whilst attending the Court upon any cause in which he is concerned (*h*); the principle of which decision seems to extend to most of the other cases of temporary privilege, mentioned *ante*, 113 to 118.

It must be served before the expiration, or on the day of the expiration of four calendar months from the date of the writ, including the day of such date (*i*). It may be served late at night (*j*), though, of course, this is not recommended, except in urgent cases. If served on a Sunday, however, the service will be void (29 C. 3, c. 7, s. 6), and no subsequent act of the defendant will be deemed a waiver of this irregularity (*k*). It may be served either by the attorney or his clerk, or in fact by any person who can read, so as to be able to swear that he served a true copy of the writ (*l*).

It is a copy of the writ of summons, and not the writ itself, that should be served (*m*).

(*d*) *Drew v. Murriett*, 1 Wils. 77; and see *Chase v. Joyce*, 4 M. & S. 412.

(*e*) *Storer v. Rayson*, 4 D. & R. 739, 3 B. & C. 158, S. C.; *Webber v. Manning*, 1 Dowl. P. C. 24; *Coulson v. King*, 2 C. & J. 474.

(*f*) *Anon. v. Walters*, 1 Chit. Rep. 14; *Id.* 333; *Webber v. Manning*. 1 Dowl. P. C. 24; *Thompson v. Burton*. *Id.* 428.

(*g*) *Lloyd v. Smith*, 1 Dowl. P. C. 372.

(*h*) *Cole v. Hawkins*, 2 Str. 1034.

(*i*) Formerly, when the return day was mentioned in the writ, the writ must have been served on or before that day (*Whale v. Fuller*, 1 H. Bla. 222); but a service at any time on the return day (*Haynes v. Jones*, 3 Taunt. 404), even after the rising of the Court, (*Maud v. Barnard*, 2 Burr. 812), was sufficient.

(*j*) *Robertson v. Douglas*, 1 T.R. 191; *Maud v. Barnard*, 2 Burr. 812; *Anon.* 2 Chit. Rep. 367; *Upton v. McKenzie*, 1 D. & R. 172; *Pridde v. Cooper*, 1 Bing. 66.

(*k*) *Taylor v. Phillips*, 3 East, 156.

(*l*) *Ca. Prac.* C. B. 34; *Pr. Reg.* 345; and see 2 *Barnard*. 344.

(*m*) Before the 2 W. 4, c. 39, in proceedings by original, &c., it was a copy of the process, that is, a copy of the *capias*, and not of the original, which must in all cases have been served. (*Peter v. Reignier*, Barnes, 410). So, where the process was directed to a county palatine, a copy of the process issuing from this Court, with or without the mandate, or of the mandate, must have been served. (*Evers v. Whitaker*, Barnes, 406, *Pr. Reg.* 344, 2 *Barnard*. 318). There was no occasion to serve both. (*Ashbrook v. Townley*, 2 B.



The copy of the writ must be served *personally* upon the defendant (*n*), or defendants, if there be more than one (*o*); and no difficulty in effecting personal service will dispense with it; but it is not necessary to leave the process in the actual corporal (*p*) possession of the defendant; for, whether the party touches him, or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be where you see a person; and bring the process to his notice (*q*). Where a writ was put through the crevice of a door to the defendant, who had locked himself in, the service was deemed sufficient (*r*); and the same, where it was inclosed in a letter, which was proved to have been received by the defendant, and that he took out the copy (*s*). But sending process by the post in a letter, which the defendant refuses to receive, is not good service, although the refusal may have been wilful, and accompanied by long avoidance of service (*t*). Where a father eluded the service of process, and the process was served at his house on his son, who said his father was within, and that he should receive the process, and it did not otherwise appear but that it had come to the defendant's hands, the service was deemed sufficient (*u*). Where the process is against husband and wife, service on the husband will be sufficient; and if he do not enter an appearance for both, the plaintiff may do so in pursuance of the statute (*x*). If the writ be against a corporation aggregate, it should be served on the mayor, or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. If it be against a hundred, or other like district, it should be served on the high constable, or any of the high constables thereof. And if against the inhabitants of a county of a city or town, or the inhabitants of a franchise, liberty, city, town or place, not being part of a hundred or other like district, it should be served on some peace officer thereof. (2 W. 4, c. 39, s. 13). In serving the copy it is not necessary to shew the writ itself (*y*), unless the defendant demand it at the time of, or, as it seems, immediately after the service (*z*). If the defendant refuse to receive it when tendered to him, it may be left for him at his house (*a*).

The person who serves the writ must indorse on it the day of the month and week of the service, as noticed *ante*, 448 (2 W. 4, c. 39, s. 1) otherwise the plaintiff cannot enter an appearance for the defendant, according to the statute, and the affidavit upon which such appear-

& Adol. 416; but see *Karl Shrewsbury v. Haycraft*, 6 Bing. 194, which is overruled in *K. B.*

(n) Lofft, 233.

(o) See *Smith v. Muller*, 3 T. R. 687; *Christie v. Walker*, 1 Bing. 48.

(p) *Dight v. Thompson*, MS. F. T. April, 1832, 1 Dowl. P. C. 363, S. C.; *Thomson v. Phenev*, Id. 441.

(q) *Per Patterson, J.*, *Thomson v. Phenev*, K. B. Ball Court, 12th June, 1832, MS., 1 Dowl. P. C. 441, S. C.

(r) *Smith v. Winstle*, Barnes, 405.

(s) *Bumrell v. Roberts*, Barnes, 422; and see *Aldred v. Hicks*, 5 Taunt. 186; *Arrowsmith v. Ingle*, 3 Taunt. 234.

(t) *Ridpath v. Williams*, 11 B. Moore. 333, 3 Bing. 443, S. C.

(u) *Rhodes v. Innes*, 7 Bingh. 329, 6 M. & P. 153, 1 Dowl. P. C. 215, S. C.

(v) *Henscombe v. Loece*, Barnes, 406; *Collins v. Shapland*, Id. 412.

(y) *Worley v. Gibson*, 2 Str. 877; *Parchand v. Wadley*, Barnes, 302; *Hauvrell v. Roberts*, Id. 423.

(z) *Thomas v. Pearce*, 4 D. & R. 317, 2 B. & C. 761, S. C.; *Edgar v. Farmer*, Hardw. 138; *Wentley v. Jones*, 5 Moore, 136; *Petit v. Ambrose*, 6 M. & S. 274.

(a) *Wood v. Dodgson*, Barnes, 278; *Hell v. Vincent*, 7 D. & R. 233. See *Pigeon v. Bruce*, 8 Taunt. 410.

ance is to be entered, must state the day when such indorsement was made. (*R. M. 3 W. 4, r. 3*).

If there be any irregularity in the service of the process, the application to the Court must be, to set aside the service of the writ and the subsequent proceedings, but you cannot apply to quash or set aside the writ itself (*b*). Such application must be made within the eight days limited for the defendant's appearance, and before he has appeared.

On the other hand, if the plaintiff discover an irregularity in the service of the process, before defendant has appeared, he had better give him notice not to appear thereto, and issue fresh process, and serve him afresh: for this would afford an answer to defendant's subsequent application to the Court or a Judge, to set aside the irregular service (*c*). But, if the defendant has really incurred any costs (which would be allowed him on the taxation), before the service of such notice, the plaintiff should tender them, otherwise the Court or a Judge might compel him to pay them.

*Alias, pluries, and other writs after it, if not served.*] If the defendant, or in the case of several defendants, if all of them be not served with the copy of the writ of summons within four calendar months from the day of the date of it, including such day, you may continue the writ by, and sue out an *alias* writ of summons, and after that a *pluries*, as the case may require, until the defendant, or all the defendants in case of several, be served. (*2 W. 4, c. 39, s. 10; R. M. 3 W. 4, r. 6*). Or if it be not possible to serve the defendant, then you must proceed by writ of *distringas*, as mentioned in the next chapter, or else you must proceed to outlaw him, as mentioned in the second volume of this work, Book 4, Part 1, Chap 2. These *alias* and *pluries* writs when issued into the same county as the writ of summons, differ only in form from the first writ of summons, in inserting after the words "we command you," the words "as before," or in the case of a *pluries*, "as often we have commanded you, &c." (*d*). When issued into another county than the first writ of summons, the *alias* or *pluries* writ, should describe the defendant as of the place of his residence in the county into which it is issued, as also, as "late of the place of which he was described in the first writ of summons. In other respects the *alias* or *pluries* writ (into a different county) is the same as an *alias* or *pluries* into the same county as the first writ of summons (*e*). They are sued out and indorsed, &c. in the same manner as the writ of summons; pay 2s. 6d. (*R. M. 3 W. 4, r. 2*), for signing, pay 7d. (*Id.*) for sealing. They may, it should seem, be sued out and dated accordingly, at any time after the first or preceding writ, unless you intend to avail yourself of the writ in order to take the case out of the statute of limitations, when some particular proceedings must be adopted thereon,

(b) MS. Mich. 1314.

(c) See form of notice, Chit. Forms.

(d) The schedule of 2 W. 4, c. 39, prescribes the form. See it, Chit.

Forms.

(e) R. M. 3 W. 4, r. 7, prescribes the form; and see it, Chit. Forms.

as noticed in the second volume of this work, Book 4, Part 1, Chap. 1. These writs should correspond strictly with the preceding writs; for, if the writ of summons, for instance, be against the defendant by one christian name, and the *alias* or *pluries* by another, the Court will, it seems, set aside the proceedings, if the application be made within the eight days limited for the appearance, and before appearance (*e*). Where the copy of the first writ was served by mistake upon a wrong person, service of a copy of an *alias* afterwards upon the right person, was holden regular (*f*).

[*Defects in writ, how and when taken advantage of.*] We have already seen in the preceding pages in what respects the writ may be defective. As regards the mode of taking advantage of such defect, or of a variance between the writ and declaration, the defendant cannot take such advantage either by plea in abatement, for the Court will not now grant *oyer* of the writ (*g*), nor by writ of error (*h*). But for some defects in the writ which we have pointed out, the Court will set aside the writ, or the service and proceedings thereon. And by the late rule of *M. T. 3 W. 4, r. 10*, if the plaintiff or his attorney omit to insert, or indorse on the writ or a copy thereof, any of the matters required by the statute *2 W. 4, c. 39*, to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to the Court or a Judge. The application to set aside the writ, or the service and proceedings under it, must be made to the Court in term, on a motion supported by affidavit (*i*), or to a judge in vacation on a summons. The application should, it seems, in general, be made within the eight days limited for defendant's appearance (*j*). But, if the writ be absolutely void (which can rarely be the case), it should seem the application might be made after that time.

[*When writ amended.*] The Court may, it seems, allow the writ to be amended for any defect, if it be not void (*k*), and if there be any thing to amend by, as, for instance, the *præcipe* (*l*); and even where there was nothing to amend by, the Court allowed an amendment, by inserting the christian names of the defendants, which had been omitted by mistake (*m*); and in another case, by altering the name of the defendant (*n*); and in another case, by striking out the name of a plaintiff or defendant (*o*): and an amendment will, it seems, be

(*e*) See *Corbet v. Butts*, 3 T. R. 660.

(*f*) *Clarke v. Johnson*, 2 B. & Cres. 55, 3 D. & R. 254, S. C.

(*g*) *Boots v. Edwards*, 1 Doug. 227; *Deshane v. Hend*, 7 East, 383.

(*h*) See 1 Saund. 318 a; *King v. Bishop of Carlisle*, Barnes, 9.

(*i*) See a form, Chit. Forms.

(*j*) See the decisions as to bailable cases, *ante*, 110.

(*k*) See *Keworth v. Peppin*, 4 B. &

Ald. 288.

(*l*) See *Green v. Rennett*, 1 T. R. 702; *Adams v. Luck*, 6 Moore, 113, 3 B. & B. 25, S. C.; *Walker v. Hawkey*, 1 Marsh. 309, 5 Taunt. 853, S. C.

(*m*) See *Rutherford v. Mein*, 2 Smith, 392.

(*n*) *Carr v. Shaw*, 7 T. R. 290.

(*o*) *Fox v. Chilton*, 1 Chit. Plead. 14, n. 5 ed.

allowed, by inserting the name of another person as plaintiff or defendant, unless at a late stage of the proceedings, and where the defendant swears that he has been defending on account of the omission (*p*). If the application for the amendment be not made until after an application to set aside the writ, it would in general only be granted upon the terms of paying the costs of such application. No amendment will be allowed if the writ be void (*q*).

Formerly, when the return day was specified in the process, a mistake might have been cured by altering the writ, and getting it re-sealed, and serving the defendant again if already served (*r*); and the return day might be altered and postponed from time to time, on re-sealing the writ, provided a term did not intervene between the *teste* and the altered return day (*s*).

[*Appearance.*] Regularly, upon the defendant's being served with a copy of the writ, either he or his attorney should, within eight days after such service, inclusive of the day of service, enter an appearance with the clerk of the common bails (*t*), or, in default thereof, the plaintiff, upon making and filing an affidavit of the personal service of the copy of the writ, may enter a common appearance for the defendant, and proceed thereon, as if such defendant had duly appeared himself. (2 *W.* 1, c. 39; 5 *G.* 2, c. 27). These eight days are, as already observed, *ante*, 445, reckoned inclusive of the day of the service of the writ; and if the last of the eight days happen to be Sunday, Christmas-day, or a day appointed for a public fast or thanksgiving, the defendant has the entire of the following day to enter his appearance, or if the last of the eight days happen to be any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day must be considered the last of such eight days. (2 *W.* 4, c. 39, s. 11) (*u*). If the appearance be not entered within that time by the defendant, the plaintiff may enter it for him on the ninth day, or at any time afterwards, as it seems, during the following term, or at any time afterwards before the first day of the second term after the service of the writ, and then proceed in the action (*x*). It may be observed, that though the writ be served on a day between the 10th August, and 24th of October, the appearance may be entered either by the defendant or plaintiff at the expiration of the

(*p*) *Baker v. Haarer*, 22 Nov. 1832, Exch. MS., 1 C. & M. 112, S. C.; *Tubbrun v. Tenant*, 1 B. & P. 481, n.; and vide *Binns v. Ivatt*, 1 Chit. Rep. 369; *Adamson v. Anon.* 1d. n.

(*q*) See *Kennecorthy v. Peppnat*, 4 B. & Ald. 288.

(*r*) *Israel v. Middleton*, 1 Chit. Rep. 321; *Anon.* 1d. 394.

(*s*) *Durden v. Hammond*, 1 B. & Cress. 111, 2 D. & Ry. 211, S. C.

(*t*) See the form of the writ, *ante*, 441.

(*u*) See the former practice as to the

time for entering the appearance in actions by original, (*Hunter v. Simpson*, 4 D. & R. 713, 3 B. & C. 110, S. C.; *Bousquet v. Rimbaud*, Barnes, 245; *Shadwell v. Angell*, 1 Bur. 56, 2 Arch. Prac. 2 ed. 335), by bill, (2 Arch. Prac. 2 ed. 345).

(*x*) See *Prigmore v. Bradley*, 6 East, 314; *Bridgen v. Burr*, 10 B. & Cress. 457; *Smith v. Painter*, 2 T. R. 719. It must, in all cases, have been entered as of the term in which the writ was returnable. (*Hardw.* 136; 2 T. R. 720).

eighth day, though, indeed, no declaration or pleading after declaration can be filed or delivered between the said 10th August, and 24th October. (2 W. 4, c. 39, s. 11).

If entered by the defendant, make out a memorandum for the appearance (y), as prescribed by the 2 W. 4, c. 39, s. 2, and take it to the clerk of the common bails, who will thereupon enter the appearance. Pay him 1s., (R. M. 3 W. 4, r. 2), and if an appearance for more than one defendant be entered by the same attorney, pay him 4d., (Id.), for each additional defendant. The memorandum of appearance so delivered to the clerk of the common bails must be dated on the day of such delivery. (2 W. 4, c. 39, s. 2).

If entered by the plaintiff: first search with the clerk of the common bails if the defendant have entered an appearance; and if not, then let an affidavit of the service of the summons be made, either before a Judge or a Commissioner of the Court, or before the clerk of the common bails, or his deputy, (5 G. 2, c. 27), by the person who served it (z). Take it to the clerk of the common bails, together with a memorandum for the appearance as above mentioned, and he will enter the appearance. An affidavit of service sworn before the plaintiff's attorney, or his clerk, will not suffice. (R. H. 2 W. 4, r. 3). If the copy of the writ were served by an officer, the Court, upon application, will compel him to make affidavit of service (a). The affidavit should, in all cases, describe the kind of writ that was served; for, where it stated generally a service of a "writ of mesne process," the Court set aside the proceedings, even after judgment (b). The affidavit must state that within three days, at least, after the service of the writ, the person serving it indorsed on it the day of the week and month of such service; and the affidavit must state positively the day on which such indorsement was made. (R. M. 3 W. 4, r. 3).

Care must be taken that the entry of appearance corresponds with the summons in the names and number of the parties, &c., see *ante*, 442, 444; or it may be treated as no appearance if there be a material variance. As to how the defendant or plaintiff should enter the appearance, where there has been a misnomer in the summons, see *ante*, 442, 443.

As to an attorney's undertaking to appear, see *ante*, 39, 40.

[*Declaration and subsequent proceedings.*] The declaration, in non-bailable cases, is in most respects the same as in bailable cases; and which, together with the difference in the practice between the two, when such difference prevails, has been already treated of. (*Ante*, 183 to 193). The Court have, by R. M. 3 W. 4, r. 15, prescribed a form for the commencement of a declaration in a non-bailable action, which will be found in *Chit. Forms*, 95. The consequences of a mistake in a declaration in bailable cases, in a variance between the writ or affi-

(y) See the form, *Chit. Forms*.  
(z) *Id.*

(a) *Res v. Rudge*, 1 W. Bl. 432.  
(b) 1 Sellon, 96.

davit to hold bail and declaration, are in general more serious than in *non-bailable* cases, as such variance frequently affords a ground for discharging the bail. As to the time for declaring, see *ante*, 183 to 188; as to how to declare, see *ante*, 188; as to how to declare where there has been a misnomer in the writ, see *ante*, 443; as to how far the declaration must agree with the writ in the number of the parties, see *ante*, 190. The practice in all the subsequent stages of the cause, will be found *ante*, 193 to 439.

## CHAPTER II.

PROCEEDINGS BY WRIT OF SUMMONS AND DISTINGAS, WHERE  
THE DEFENDANT CANNOT BE SERVED WITH THE SUMMONS.

THIS proceeding, by writ of summons and *distringas*, is adopted in all cases where the defendant has a place of residence within England or Wales, but, from his being out of the way, or from other circumstances, he cannot be arrested or served with process. This method of proceeding is now provided for by the 2 *W. 4, c. 39, s. 3 (a)*, and is as follows:—"In case it shall be made appear by affidavit, to the satisfaction of the Court out of which the process issued, or, in vacation, of any Judge of either of the said Courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, *ante*, 441, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then, and in any such case, it shall be lawful for such Court or Judge to order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such Court or Judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form and with the notice subscribed thereto mentioned in the schedule to this act; (*see form, post*, 459); which writ of *distringas* and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such *distringas* shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the *teste* thereof, and shall bear *teste* on the day of the issuing thereof, whether in term or in vacation; and if such writ of *distringas* shall be returned *non est inventus* and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of *distringas* issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit, to the satisfaction of the Court out of which such writ of *distringas* issued, or, in vacation, of any Judge of either of the said Courts, that due and proper means were taken

(a) See the prior statute, 7 & 8 G. 4, c. 71.

and used to serve and execute such writ of *distringas*, it shall be lawful for such Court or Judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution."

This is a material improvement upon the old common law mode of proceeding upon an original writ, by summons, attachment, and *distringas*. For at common law you could not proceed in the action, unless the defendant appeared; and, in order to compel an appearance, you were obliged to harass him with a succession of writs of *distringas*, upon each of which you levied issues; which issues the Court, indeed, allowed to be sold, from time to time, for the payment of your costs, but they were not allowed to be applied in satisfaction of your debt:—a mode of proceeding so productive of delay and expense, so liable to abuse, and so often adopted for the purposes of oppression, and from other improper motives, that the legislature were at length obliged to interfere, and to alter it by the statute 7 & 8 G. 4, c. 71, and afterwards by the statute above mentioned (b).

*The writ of summons.*] *The writ of summons must be framed and sued out, in the manner already fully noticed in the preceding chapter. We have seen ante, 446, that this writ remains in force during four calendar months from the day of its date inclusive. If, after due diligence, and through the defendant's default, you cannot personally serve the defendant with a copy of the writ, or obtain his attorney's undertaking to appear, and the defendant has not appeared, then, if you are desirous of enforcing an appearance, you must, after having obtained the leave of the Court or a Judge for that purpose, issue a writ of distringas. If the defendant has been personally served with the summons, or his attorney have undertaken to appear for him, of course there would be no occasion for the writ of distringas, though he has not appeared; for in the first instance you might enter an appearance for him according to the statute, and in the second, might compel the attorney to enter an appearance according to his undertaking; and as soon as the appearance has been entered you may proceed in the action, as in ordinary cases in non-bailable actions.*

It should be here observed, that, in order to procure the leave of the Court or a Judge for the issuing of the *distringas* you should use all possible diligence to serve the defendant personally with the summons, and at all events you should make three several applications at his actual or supposed residence on three different occasions; and on each of such occasions you should apprize the person whom you see, of the nature of your business, and say you will call again at a future day, naming the hour, and endeavour to make an appointment to see the defendant, and on the last (c) of such occasions you should

(b) The enactments do not extend to process by attachment on a *judicium in a county palatine*. *Mason v. Taylor*, 3 Taunt. 121.

(c) *Hill v. Maule*, 1 C. & M. 617.

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Exch., and see *Street v. Lord Alencley*, 1 C. & M. 27, 1 Dowl. P. C. 639, S. C.; and *Id. n. (a)*, 2 Dowl. P. C. 16. *Scourborough v. Adams*, *Id.* 9.



leave a copy of the writ of summons for him (c); and you should, in short, collect such facts as will enable you to swear positively, or to your belief (stating the reason; for such belief), that the defendant keeps out of the way to avoid the service. If the defendant's residence be unknown, the party must use his utmost endeavours personally to serve him, and be prepared to swear specifically to such endeavours.

*The writ of distringas—How obtained—Form of, &c.*] This writ to enforce an appearance cannot be issued without the order of the Court in term, or a Judge in vacation, (2 W. 4, c. 39, s. 3) (d), whom you must satisfy as to the necessity for it, before they will grant the order. The application cannot be made until the expiration of eight days after the last attempt to serve the defendant with the summons (e). To obtain the order, first make search with the clerk of the common bails if the defendant have entered an appearance. If he have not, then make an affidavit thereof (f), and of the issuing of the summons, and state therein facts sufficient to show the Court or a Judge that the defendant cannot be compelled to appear without some more efficacious process (g). If in term time, deliver this affidavit to counsel, with a brief "to move for a distringas to compel the defendant's appearance" (h), and let him move accordingly for the distringas; if in vacation, lay the affidavit before a Judge, and if he approve of it, he will make an order accordingly (i). The rule, if granted, is absolute in the first instance. It should be here observed, that, though the defendant be abroad, yet if he carries on trade or keeps an establishment in this country, the Court or a Judge may order the *distringas* to issue to compel his appearance (j), but not to outlaw him (k).

The affidavit in support of the application must show that the deponent has used all possible diligence, and that no means have been left untried, to serve the defendant personally with the summons, and, at all events, that he has made three several applications at his actual or supposed residence, on three different occasions, and that on each of such occasions he apprized the person whom he saw of the nature of his business, and that he said he would call again at a future day, naming the hour, and that he endeavoured to make an appointment, and to see the defendant, and that, on the last (l) of such occasions, he left a copy of the writ for him (m); and the deponent should swear positively, or to his belief (stating the reasons for such belief) that the defendant keeps out of the way to avoid the ser-

(c) *Dugden v. Kelly*, 10th Nov. 1832, K.B. MS.; *Coett v. Willis*, 20th Nov. 1832, K.B. MS.; *Atkins v. Lanthier*, 24th Nov. 1832, Exch. MS.; *Street v. Atanley*, 1 C. & M. 27, 1 Dowl. P. C. 68B, S. C.; *Halgay v. Gardener*, 2 Dowl. P. C. 52; and cases post, 459.

(d) See *Farnel v. Stamford*, 2 C. & J. 435; *Pennel v. Kingston*, 1 Id. 548; *Watson v. Locke*, 2 C. & J. 203.

(e) *Brian v. Streeton*, 1 C. & M. 74, 1 Dowl. P. C. 642, S. C.; *Atkins v. Lowther*, 24th Nov. 1832, Exch. MS.; *Smith v. James*, 20th Nov. 1832, K.B. MS.

(f) See a form, Chit. Forms, 343.

(g) See a form, Chit. Forms, 344.

(h) The Court will not grant the rule in the alternative, to compel an appearance of, or to outlaw, the defendant. *Fraser v. Case*, 1 Dowl. P. C. 725, 9 Bing. 464, 2 M. & Scott, 720, S. C.

(i) See the forms, Chit. Forms, 344.

(j) *Howley v. Howling*, 11 Moore, 322; *Gurney v. Hardenburgh*, 1 Taunt. 407, see vide *Fraser v. Case*, *supra*.

(k) See *Fraser v. Case*, *supra*.

(l) *Ante*, 457, n. (c).

(m) See the cases cited in n. (c) *supra*.

vice (m). If the defendant's residence be unknown, you must then shew on the affidavit that the utmost endeavours have been used to serve him personally. A mere affidavit, that a party has called several times at the defendant's house, for the purpose of serving him, but that he could not find him, and that the answers were that he was out of town, or the like, and that it was verily believed that he kept out of the way to avoid being served, would be insufficient: the affidavit must shew that the defendant was at home or in the neighbourhood, or that he is in the country, &c., and that there is a reasonable cause for the belief of the deponent that the service is purposely evaded (n). The affidavit must state where the residence, or supposed residence of the defendant is situated (o). It must also set forth the tenor of the summons (p) in *hæc verba* (q). It may be here observed, that a *distringas* for proceeding to outlawry may be grantable under circumstances, which would not entitle the plaintiff to a *distringas* to compel an appearance (r).

Although the Court give leave to issue the *distringas* upon a defective affidavit, yet they will not on that account afterwards set aside the *distringas* (s).

Having obtained a rule or order allowing you to sue out this *distringas*, prepare a præcipe for the office (t); also get a blank writ of *distringas* (which may be had at the stationers' or elsewhere), and fill it up according to the directions, *infra*, et post, 460; take them, together with the order for the *distringas*, to the signer of the writs, who will sign the writ; pay 2s. 6d. (R. M. 3 W. 4, r. 2). Get it sealed, pay 7d. (Id.)

The following is the form of the writ as prescribed by the 2 W. 4, c. 39, s. 3.

*William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, To the sheriff of*

*Greeting. We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of C. D. for the sum of forty shillings, in order to compel his appearance in our Court of King's Bench to answer A. B. in a plea of trespass on the case [or of "debt," or as the case may be]; and how you shall execute this our writ you make known to us in our said Court, on the day of now next ensuing. Witness [name of Chief Justice] at Westminster the day of in the year of our reign [some day in term time].*

And the following notice must be subscribed to the writ.

*In the Court of King's Bench,*

*Between A. B. Plaintiff, and C. D. Defendant.*

*Mr. C. D.,*

*Take notice, that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said Court to answer the said A. B., according to the*

(m) *Id.* 1 Dowl. P. C. 638, n.; *Down v. Croice*, 1 Marsh. 267, 5 Taunt. 524, n. C.; *Turner v. Smith*, 1 M. & P. 357. It was decided by Bayley, B., in *Johnson v. House*, 1 C. & M. 26, that the old practice as to what was requisite to be stated in the affidavit on moving for a *distringas* on a return in the Exchequer, is applicable to the new process by writ of summons.

(n) *Turner v. Smith*, 3 Moore, 371, note, 1 M. & P. 357, n. C.; and see *Price*

*v. Bance*, 2 Dowl. P. C. 1; *Waddington v. Palmer*, *Id.* 7.

(o) *Pitt v. Eldred*, 1 C. & J. 147; *Bance v. Austin*, 2 *Id.* 45.

(p) *Hill v. Wilkinson*, 4 Taunt. 619.

(q) *Hannum v. Dietrichsen*, 5 Taunt. 824.

(r) *Jones v. Price*, 2 Dowl. P. C. 424.

(s) *Smith v. Macdonald*, 1 Dowl. P. C. 688.

(t) See a form, *Chit. Forms*, 344.

exigency of a writ of summons, bearing teste on the day of ; and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, [or, if the defendant be subject to outlawry, "will cause proceedings to be taken to outlaw you"].

The 2 W. 4, c. 39, imperatively requires this form to be adopted (s); and any material variation therefrom would render it irregular, and in some cases void.

The observations already made *ante*, 442 to 446, as to the parts and requisites of the writ of summons, will, for the most part, be here applicable *mutatis mutandis*.

It is to be observed, that this writ of *distringas* must be directed to the sheriff of the county wherein the dwelling-house, or place of defendant's abode is situate, or to such other sheriff or person as the Court or Judge may order. (2 W. 4, c. 39, s. 3.) In some instances, the writ must be directed differently; see them, together with the observations as to the *non omittas* clause, *ante*, 97, 98.

We have seen the consequences of a mistake in the names or number of the parties in a writ of summons, *ante*, 442, 444. If the defendant be not correctly named in this writ, the sheriff or officer will not be justified in executing it (t).

The writ should correspond with the summons in the statement of the cause of action, &c.

The writ remains in force for, and may be executed in, four calendar months from its date inclusive. (*Ante*, 446).

As to the time for the defendant's appearance thereon, see *ante*, 453.

Unlike the writ of summons, this writ of *distringas* must be made returnable on some day *in term*, not being less than fifteen days after the teste thereof. (2 W. 4, c. 39, s. 3.) The fifteen days are to be reckoned exclusive of the day of the teste. If returnable on a *dies non*, it would, it seems, be void (u). The sheriff is required by the writ to make his return thereto on the return day; and as to ruling him to make the return, and how far he is in contempt, and subject to an attachment for not making it, &c., see *ante*, 131 to 135.

It should be tested on the day of issuing it, and this whether in term or vacation. If, by mistake, a wrong king's name be inserted, it is immaterial, provided the writ contain the name of the chief, or, if no chief, of the senior *justice* Judge of the Court, and as it must do (v). It seems immaterial whether the day and year be stated in words at length or in figures (w).

As regards the before-mentioned notice subscribed to this writ of *distringas*, it must be intitled in the Court in which it was sued out, and in the proper names of all the plaintiffs and defendants, and must in other respects correspond with the prescribed form, *ante*, 459, or it would render the writ irregular.

If the action be for the recovery of a debt, it must be indorsed with

(s) See *Smith v. Crump*, 1 Dowl. P. C. 519.

(t) *Cole v. Hindson*, 6 T. R. 234, *ante*, 101.

(u) See *Kensworthy v. Peppiat*, 4 B. & Id. 288.

(v) See *Elvin v. Drummond*, 4 Bingh. 278, 12 Moore, 523, S.C.; 2 W. 4, c. 30, s. 12.

(w) See *Butler v. Cohen*, 4 M. & Sel. 333; *Eyre v. Welsh*, 6 Taunt. 333; and vide *Grogan v. Lee*, 5 Taunt. 631.

a statement of the amount of the plaintiff's claim and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. (*R. M. 3 W. 4, r. 5*). This indorsement is fully noticed, *ante*, 447.

If there be any irregularity in the writ or notice in any of these respects, the Court in term, or a Judge in vacation, would set it aside. (*Sec R. M. 3 W. 4, r. 10, ante*, 110). The application, however, for this purpose, should, it seems, be made within the eight days limited for the defendant's appearance, and before appearance.

We have already seen when the Court will allow the amendment of mesne process, *ante*, 452.

*How executed, and appearance on.] Having sued out this writ and notice as above mentioned, and made the indorsement thereon of the debt and costs (when necessary), make a copy thereof to be served on the defendant, or to be left at the place where the distringas is to be executed. Then take this writ and notice to the sheriff's office, and get a warrant thereon, directed to the sheriff's officer whom you intend employing to execute the writ: pay 1s. for such warrant in Middlesex, London, Surrey, Sussex, or Kent; 2s. 6d. in any other county. Give the copy of the writ and notice and the warrant to the officer, who will, thereupon, execute the writ; or, you may give the writ and notice and copy to the officer you employ, and he will procure the warrant. The nature of a sheriff's warrant, and who may execute it, have been already noticed, *ante*, 112.*

*If the distringas can be executed, the officer will thereupon distrain upon the defendant's goods and chattels to the amount of 40s. under the warrant, and he should serve a copy of the writ and notice on the defendant, if he can be met with, or, if not, he should leave it at the place where the distringas is executed. (2 W. 4, c. 39, s. 3). The writ may, it seems, be executed before or on the return day (1). It must not be executed on a Sunday, or it will be illegal (y). It may be executed at any hour, even of the night (2). It may be executed at any place within the county, city, &c., to the sheriff of which the writ has been directed; otherwise it might be set aside, unless it were executed on the borders of the county, &c., and there be a dispute as to the boundaries. (See *ante*, 119). The officer cannot break open an outer door or window to make the distress; but, after he has obtained peaceable admission at the outer door, he may, if necessary, break open an inner door, even if it be the door of a lodger. (See *ante*, 120). On the ninth day inclusive, after the return day of the distringas, search with the clerk of the common bailiffs if the defendant have entered an appearance, and, if he have, you may proceed in the action as usual; if he have not, then procure the sheriff to make his return thereto, and upon an affidavit (a) being made before a judge, &c. as mentioned, *ante*, 454, of the due execution of the distringas and of the*

(x) *Moor*, 701; 1 *Salk.* 78; *Ellis v. Jackson*, 1 *Sid.* 229; *Parrot v. Mumford*, 2 *Esp.* 585.

(y) 29 *C. 2, c. 7, s. 6*; and see *Taylor*

*v. Phillips*, 3 *East*, 156.

(z) 9 *Co.* 95; *Anon.* 2 *Chit.* 357.

(a) See form, *Chit. Forms*, 346, 347.

service of the copy thereof and notice, and upon such affidavit being filed with the clerk of the common bails, you may enter an appearance for the defendant, as directed, ante, 454, and proceed in the action. The plaintiff may enter an appearance in this case without the leave of the Court (b).

If the *distringas* cannot be executed, then you must procure the sheriff to make his return thereto of non est inventus and nulla bona, which he may be compelled to do by ruling or obtaining a Judge's order on him to return the writ, as mentioned ante, 131 to 135 (c). On the ninth day inclusive after the return day of the *distringas*, search with the clerk of the common bails if the defendant have entered an appearance; and if he have, then you may proceed in the action as usual; if he have not, then, upon an affidavit (c) being made of the sheriff's return of non est inventus and nulla bona, and that due and proper means were taken and used to serve and execute the *distringas*, the Court in term, or a Judge in vacation, if satisfied by such affidavit that such means were so taken, will make an order (c), allowing the plaintiff to enter an appearance for the defendant, and to proceed thereon to judgment and execution. The observations already made, ante, 458, as to the affidavit for obtaining the *distringas*, will in most respects apply to this affidavit. The affidavit should show that the defendant has no effects any where to distrain on (f). Having obtained this rule or order, allowing you to enter an appearance, &c., take it to the clerk of the common bails, together with a memorandum for the appearance, and you may enter an appearance for the defendant as directed ante, 454, and proceed in the action.

If the appearance be made by the defendant, let it be done as directed ante, 454.

The statute of 2 W. 4, c. 39, is silent as to what is to be done with the distress under the *distringas*. It should seem, however, that it cannot be sold, and that upon the appearance being entered, the defendant is entitled to have his goods back again (g).

*Declarations, &c.*] The plaintiff cannot declare until an appearance have been entered, and then it must be absolutely. (Ante, 184). The other proceedings in the cause are as already stated. (Ante, 186 to 349).

(b) *Johnson v. Smeley*, 1 Dowl. P. C. 320.

(c) See Chit. Forms, 348.

(f) *Cornish v. King*, 6 Leg. Obs. 110, 2 Dowl. P. C. 18, S. C.

(g) See *Smith v. Macdonald*, 1 Dowl. P. C. 688. By the 10 G. 3, c. 50, s. 3, the Court may order the issues levied to be sold, and the money arising there-

by to be applied to pay the plaintiff's costs; and the surplus, if any, to be retained until the defendant has appeared, or other purpose of the writ be answered. See *Martin v. Tournahend*, 8 Bur. 3725; *Rohan v. Pleistow*, Id. 3728; and *quære*, see *Smith v. Macdonald*, 1 Dowl. P. C. 688. See the form, Chit. Forms, 342.

## BOOK I.

## PART III.

## PROCEEDINGS UPON FEIGNED ISSUES.

FEIGNED issues may be ordered either by a court of law or a court of equity. Where a matter comes before a court of law for its decision, either upon motion or argument, if a material fact in the case be denied, and the court think it of too much importance to be judged of summarily upon affidavits, they may order it to be tried in a feigned issue (a). This is also the usual and ordinary method of trying doubtful matters of fact arising in causes before the Lord Chancellor, the Vice-chancellor, and Master of the Rolls. As a feigned issue, however, is seldom ordered by a court of law, and as the proceedings upon it are very nearly the same as on a feigned issue directed by a court of equity, we shall confine our observations entirely to the latter.

*In what cases ordered.*] It is perfectly discretionary in a Chancellor or other Judge of a court of equity, to direct a fact to be tried in a feigned issue, or to decide upon it himself without the assistance of a jury. It is usual, however, where a material fact in a cause in equity is strongly controverted, particularly in causes relating to title in lands, &c., to direct that fact to be tried by a jury upon a feigned issue, in some of the superior courts of law, in order that their verdict may inform and satisfy the conscience of the Court. Where the question *deviseavit vel non* is in issue in equity, it is always, I believe, tried upon a feigned issue. The other cases in which this proceeding is usually directed are, to try the existence of a *modus*, or of a real composition for tithes, or to try if a party or other person be heir-at-law of a person deceased, or to try the validity of a fiat of bankrupt.

This issue is usually ordered to be made up in the Court of King's Bench or Common Pleas, and to be tried before the Lord Chief Justice of such Court, either at the sittings in Middlesex or London; it is sometimes ordered to be tried in a particular county at the assizes.

(a) See Cowp. 824; *Rees v. Mayne* and *Juratsa of Rye*, 2 Bur. 738; *Haskins v Berkeley, Ltd.*, 4 T. R. 402; and see 1 & 2

W. 4, c. 56, *post*, Vol. 2, Book 4, Part 1, Chap. 2.

The interlocutory decree also directs who is to be plaintiff and who defendant.

*The issue.*] The issue is the same in form as in ordinary cases, where the suit is commenced by writ of summons: (See ante, 214). After the usual commencement, as in an issue, it sets forth a declaration in *assumpsit* upon a wager of 10*l.*, whether the fact is so or so; then a plea, confessing the wager and *assumpsit*, but denying the fact to be as is stated in the declaration; and, lastly, the award of the *venire facias* (b). Where two or more facts, distinct in themselves, but forming only one transaction, are to be tried, then, in making up the issue, you insert a count and plea as to each fact, and then the award of the *venire facias*; so that they may be tried at the same time by the same jury, and that the verdict of the jury as to each fact may appear distinct and separate upon the *postea* (c). In this, however, and in all other respects, the issue must pursue the interlocutory decree by which it has been directed.

Get a copy of the interlocutory decree, and leave it with a barrister or pleader, with instructions to prepare a draft of the same; or you may prepare it yourself, and leave it with the barrister or pleader to settle. When settled, give a copy of it to the opposite attorney, who will also have it settled by counsel. If you and he agree upon the form of it, you then proceed in the action. If not, you should first get an appointment for a meeting between the counsel or pleader on each side, who settled the issue; and if they cannot agree upon it, then take the interlocutory order, and the draft of the issue, to the master mentioned in the order, and he will settle the issue; for which purpose the parties may attend before him by counsel. When finally settled, give a copy of the issue to the opposite attorney; and you may indorse the notice of trial upon it, as in ordinary cases.

If the plaintiff will not make up the issue, the defendant may move the court of equity that the matter directed to be put in issue may be taken *pro confesso*; which the Court will order accordingly (d), unless the plaintiff shew some reasonable and satisfactory cause for his not having done so. Or if it be made up, but in such a manner that the matters intended by the Court to be tried are not put in issue or found by the jury, the Court will order a new trial.

*Nisi prius record, &c.*] The record of *nisi prius* must be made up, sealed, and passed, as in ordinary cases, where the suit is commenced by writ of summons. (See ante, 254).

The jury process is also sued out as in ordinary cases, excepting that it must be made returnable on a general return day, and not on a day certain (e). Also, if a special jury be desired (f), or a view be necessary (g), the motion for these purposes must be made to the court of equity.

(b) See the form, Chit. Forms, 351.

(c) See 2 Ves. Jun. 287, 222.

(d) Pr. Reg. 264.

(e) *Rex v. Roberts*, 1 Wils. 77.

(f) 2 P. Wms. 62.

(g) Pr. Reg. 263.

**Trial.]** The cause must next be entered for trial with the marshal, as directed *ante*, 265. But if the defendant be desirous of bringing the cause to trial, and he have any reason to think that the plaintiff wishes to delay it, the Court, upon application, will allow him to take down the record by proviso (*h*). Or, if the plaintiff do not proceed to trial by the time directed, the defendant, in the next subsequent term, may move the court of equity that the matters in issue at common law may be taken *pro confesso*. This the court of equity will order, unless the plaintiff shew some reasonable and satisfactory cause for his default, and enter into an undertaking to try peremptorily by a time appointed by the court. Also, it seems, costs for not proceeding to trial may be obtained, upon motion in the court of equity, in the same manner as in a court of law.

The trial is the same as in ordinary cases; excepting that the interlocutory decree usually directs that particular matters therein mentioned shall be admitted or allowed in evidence; that the depositions of such witnesses as shall be dead at the time of the trial, or in such a state of health as not to be capable of attending, shall be read; and it also, in some cases, orders that the plaintiff or defendant shall attend to be examined (*i*). These and other matters ordered by the interlocutory decree, are strictly to be observed at the trial. Where the Court of Chancery has ordered that a third party shall be at liberty to attend the trial, the counsel for such party will not be permitted to call witnesses, nor address the jury (*j*).

If the plaintiff wish, he may elect to be nonsuit in this, as in ordinary cases (*k*).

An application may be made to a Judge at *Nisi Prius* to put off the trial of an issue directed by the Lord Chancellor (*l*).

**Postea, &c.]** The *postea* is indorsed on the *Nisi Prius* record, as in ordinary cases; but it is not necessary or usual to enter up judgment, unless perhaps where the jury have found a special verdict. After the trial, the Judge before whom it was had certifies the finding of the jury, and adds in his certificate the mention of any special circumstance he may think proper, such as that the verdict was against evidence, or the like.

**Costs.]** If the feigned issues have been ordered by a Court of Equity, the costs are entirely in the discretion of that Court, and are not in any case awarded by the Court of law (*m*). But if ordered by a Court of common law, the costs of the issue invariably follow the verdict (*n*). Where a Court of common law, however, permit parties to try a feigned issue, they may, it seems, as a condition of

(A) *Humpage v. Rowley*, 4 T. R. 767.

(i) See 15 Ves. Jun. 176.

(j) *Wright v. Wright*, 5 M. & P. 316, 7 Bing. 459, n.

(k) *Bul. N. P.* 326; *Barnes v. Hendley*, 1 Camp. 164.

(l) *Barton v. Lascote*, 4 Camp. 163.

(m) See 13 Ves. Jun. 87; 1 Atk. 611, 1 Bro. C. C. 420.

(n) *Hobart v. Williamson*, 1 Wils. 321; *Hobart v. Berkeley, Ltd.*, 4 T. R. 402. See *Earl Fitzwilliam v. Mazurell*, 7 Taunt. 31.



their granting it, oblige the parties to consent that the costs shall be in the discretion of the Court (*o*).

*New trial.*] If the party against whom the issue is found, be dissatisfied with the verdict, the application for a new trial may be made either to the court of law (*p*), or to the Court which directed the issue. Where the issue had been directed by the Master of the Rolls, it was holden that the application might be made to the Chancellor (*q*); it is better, however, in general, to make it to the Judge who directed the issue. Such an application may be made at any time during the succeeding term, or the sittings after; but it should be made in the first instance before the Lord Chief Baron, sitting alone in equity, if it arise out of a cause pending before him (*r*).

As to the cases in which a new trial will be granted: it may be laid down as a general rule that the court of equity will grant a new trial, in all cases in which it would be granted in the court of law, and in some cases also in which the court of law would refuse it. Thus, if the Judge certify that the verdict was contrary to the weight of evidence, the court of equity will order a new trial, in order that justice may be done between the parties, and the conscience of the court be satisfied (*s*); but it is said that this, or any misbehaviour of the jury, must be certified by the Judge who tried the cause, before it can be made the ground of an application to the court of equity for a new trial (*t*). So, if the judge have misdirected the jury (*u*), or have improperly rejected evidence, and such rejection be productive of injustice to either party, the Court will grant a new trial. But where, upon application for a new trial, upon the ground of the Judge's having improperly rejected evidence, it appeared upon the whole that justice had been done, the Court refused to grant it (*w*). If the party against whom the issue is found were surprised by the production of evidence which he had no reason to expect,—as if one plaintiff obtain an order *ex parte* to strike out the name of another plaintiff, and then make him a witness at the trial, and have a verdict (*x*), the Court will in general grant a new trial (*y*). Where new evidence had been obtained after verdict, the court of equity granted a new trial, although the Judge certified in favour of the verdict (*z*); but in a case where this additional evidence had been known to the party before the trial, and kept back by him, a new trial was refused, although the Court was dissatisfied with the verdict (*a*). In a late case (*b*), a new trial was granted in the Ex-

(*o*) *Hoskins v. Berkeley, Id.*, 4 T. R. 402; and see *Thomas v. Pavel*, 1 Bur. 603.

(*p*) Tidd, 918; *Holworthy v. Richards*, 2 Chit. Rep. 270. See *Bosker v. Nixon*, 6 Taunt. 443; *Stone v. Marsh*, 8 D. & R. 71; *Curstairs v. Stein*, 4 M. & S. 192.

(*q*) 11 Ves. Jun. 50.

(*r*) *Pulley v. Hutton*, 11 Price, 380.

(*s*) Amb. 210.

(*t*) Pr. Reg. 263.

(*u*) Amb. 323.

(*v*) 11 Ves. Jun. 52, 53; and see 9 Ves. Jun. 155.

(*w*) 2 Ch. Ca. 80.

(*x*) But see *Richards v. Symes*, 2 Atk. 313.

(*y*) 2 Ves. 552.

(*z*) 1 Ves. Jun. 133.

(*b*) *Willis v. Farren*, 3 Y. & J. 264, 361.

chequer, of an issue directed in a title suit, it appearing that the verdict had been obtained by surprise, and against the opinion of the Judge who tried it, the verdict being also contrary to the opinion of the equity Judge.

In cases where the title to the inheritance or freehold is the subject of the issue, the court of equity, for the more solemn determination of the cause, will sometimes order a second trial, without setting aside the first verdict (c); and if the second verdict be contrary to the first, the Court will in general upon motion order a third trial, which is ordinarily conclusive (a). But in a case where two contrary verdicts had been obtained, and upon application for a third trial, it appeared that the party now applying had, since the second verdict, removed a bank of earth, in which were some old posts, supposed to be the bottom of park pales dividing the land in question, and of which the jury, of course, could no longer have a view, the Court refused to order a third trial (d).

If the motion for a new trial be made in the Court of equity, that Court should be furnished with the report of the Judge who tried the cause; and which may be obtained from him, upon application to him by the Court of equity for that purpose.

*Subsequent proceedings*]. After the expiration of the time allowed by the Court of law to move for a new trial (see ante, 317, 318), a petition must be presented to the Court of equity for leave to set down the cause to be heard upon the equity reserved; and a copy of the interlocutory decrees, and of the record of *Nisi Prius* and *postea* thereon, must be left with the petition (e).

*Proceedings upon a Special Case without proceeding to trial.*

We have seen, ante 305, the proceedings upon a special case, where the cause has been carried down to trial. By the late Act, " & 4 W. 4, c. 42, s. 25, if the parties will consent thereto, it is not necessary to incur the expense of the trial, and the special case may be framed and argued without it. The enactment is as follows — " That it shall be lawful for the parties in any action or information, after issue joined, by consent and by order of any of the Judges of the said superior courts, to state the facts of the case, in the form of a special case, for the opinion of the Court, and to agree that a judgment shall be entered for the plaintiff or defendant, by confession or of nolle prosequi, immediately after the decision of the case, or otherwise as the Court may think fit; and judgment shall be entered accordingly."

Supposing, therefore, both parties can agree upon the facts, and are willing to have the question argued in the form of a special case, let them after issue joined attend before a Judge, who will make the desired order for that purpose (f). The special case should then be settled between the counsel or pleaders of the parties (g). If the form of it cannot be agreed on, then in order to proceed, the course seems

(c) *Baker v. Hart*, 3 Ath. 542. Pr. Reg. 263.

(d) Pr. Reg. 263.

(e) See a form of the petition, *Harri-son's Chancery Practice*, 426.

(f) See the form, *Chit. Forms*, 352.

to be to get the Judge's order discharged. The special case is not entered on the record. If insisted, perhaps the Court or a Judge will allow an amendment. The course as to proceeding to the argument of the special case will, it should seem, be nearly the same as that adopted with reference to demurrers, (pos., Vol. 2, p. 478), but the practice on this subject is not settled. After the argument and decision on the case, the judgment for the plaintiff will be in form as a judgment by confession after issue joined (h); or if it be a judgment for defendant, it will be in form as a judgment on a *nolle prosequi*.

*Proceedings upon a Case stated from a Court of Equity (i).*

Where a point of law arises in the course of a suit in equity, the Chancellor, or other Judge of the court of equity, may, if he wish to have the opinion of a court of law upon it, direct a special case to be made out and sent to a particular court of law, there to be argued, and returned with the opinion of such Court certified upon it. This has always been the practice of the Court of Chancery; but until the case of *Dainty v. Dainty* (j), the courts of common law would not certify their opinion to the Master of the Rolls (k). A case, however, cannot be sent by the committee of appeals of the privy council for the opinion of the courts of law (l).

The case is framed by, or under the direction of, the court of equity, which also directs to what court of law the case shall be sent (1). If merely directed upon a particular point, you must get the case settled by counsel on both sides. As soon as the case is ready, move for a concilium in the court of law, set down the case for argument, have copies of it delivered to the Judges, and proceed in the manner directed in the case of a special verdict or special case, ante, 304, 306. When the case comes to be argued, the counsel who has to maintain the affirmative is heard first; then the counsel on the other side; and, lastly, the former counsel is heard in reply.

After the case has been argued, the Judges will sometimes state the grounds of the opinion they intend to certify, openly in Court; and they afterwards certify their opinion to the court of equity, usually without stating the grounds of it.

If the Judge in the court of equity be dissatisfied with this opinion, or if the point be of such importance that he may wish to have the opinion also of another Court upon it, he may direct it to be sent to the Judges of another court of law. There is only one instance in which a case has been sent back to the same Court (m).

Where the opinion of the Court has been certified, you petition for leave to set down the cause for hearing upon the equity reserved, in the same manner as in the case of an issue (n).

(a) See the form, Chit. Forms, 323.

(b) As to the proceedings on a special case, see ante, 303.

(c) 6 T. R. 313.

(d) See 1 Doug. 344, n.

(e) Newl. Ch. Pr. 101.

(m) 10 Ves. Jun. 381. *Utterson v. Ferris*, 3 T. R. 539, 4 Id. 570, Newl. Ch. Pr. 181.

(n) See the form of the petition. Harrison, Ch. Pr. 426.





